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CORPORATE CRIME AND THE CANADIAN STATE: THE CASE OF POST-WAR ANTI-COMBINES LEGISLATION

by

JOHN ANDREW CASEY

©

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled CORPORATE CRIME AND THE CANADIAN STATE: THE CASE OF POST-WAR ANTI-COMBINES LEGISLATION submitted by JOHN ANDREW CASEY in partial fulfilment of the requirements for the degree of DOCTOR OF PHILOSOPHY.

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FOR MY WIFE, ELSIE

AND DAUGHTER, CHRISTINE

Abstract

Corporate illegality is an area of criminal behaviour which has been neglected by mainstream criminology. The appropriate paradigmatic approach to a study of corporate crime is that of the "new criminology" and in particular its "critical criminology" component.

The meagre research to date by exponents of this emergent paradigm is examined and found to be atheoretical and instrumental. A corrective is held to be an empirical evaluation of all models of the state and law. State models are examined and the particular instance of the Canadian state structure and its regulatory function is considered.

The study analyses state-corporate relations in Canada in the context of anti-combines enforcement in the period 1945 to 1986. The history of anti-combines law reveals weak enforcement with virtually no implementation of the merger and monopoly provision prior to the period under analysis. The methodology is comparative case analysis and the data comprise an exhaustive sample of cases adjudicated under section 33 (merger and monopoly) of the Combines Investigation Act. Merton's "manifest/latent function" typology is considered heuristically helpful in accounting for the longevity of unenforced anti-combines legislation. The data reveal a parsimonious use of the section (suggesting a reluctance to confront big capital), an increasingly restrictive judicial interpretation and lenient penalties.

While no model provides a perfect empirical fit the Marxian state model more adequately accounts for the observed pattern of enforcement. The structural-Marxian variant provides an overall explanatory framework while specifically informed by instrumental-Marxism.

The conclusion derived from the data is that the Canadian state has had no structural imperative to sustain more than a minimal level of competition. The chief function of Canadian merger and monopoly law appears to be the legitimation of monopoly capitalism. Any theoretical advancement of the "new criminology" paradigm is contingent upon a comprehensive articulation of the state and law in capitalist society.

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My wife typed the entire manuscript under considerable pressure due to a severe time constraint. For this and for her patience in enduring "the thesis" when writing and rewriting extended far beyond any reasonable time frame, I extend my thanks and appreciation.

Table of Contents

Chapter Page

I. CORPORATE CRIME

Introduction 1

Preamble 2

Development of the Concept of White-Collar Crime 3

The Post-Sutherland White-Collar Crime Debate 7

Definitions of Corporate Crime 10

Empirical Neglect of White-Collar Crime .. 13

Aubert and the Ambiguity of White-Collar Crime 16

Post- "Classical" Period 21

Corporate Crime Research in Canada 23

Summary 31

The New Criminology, the State and Regulation 32

Competition Law and the Regulatory Function 39

Conclusion 47

Footnotes 50

II. THE NEW CRIMINOLOGY, THE STATE AND LAW

Introduction 58

The "New Criminology" 59

The State

- Preamble 62
- The Liberal View of the State 62
- The Marxian Analysis of the Capitalist State 68

"Instrumental" versus "Structural" Analyses 75

Poulantzas: The State as an "Ensemble of Structures" 78

Transcending Instrumentalism and Structuralism 86

Modes of State Intervention 90

Sociology of Law

Introduction 93

The Advent of the Conflict Paradigm . 97

Law as Ideology 103

Rule of Law 108

The Class Basis of Law 112

Conclusion 115

Footnotes 116

III. THE CANADIAN STATE AND THE REGULATORY FUNCTION

Introduction 128

Evolution of the State 128

The Canadian State as Economic Regulator .138

The Theoretical Approach to the State 151

Summary 153

Footnotes 158

IV. COMBINES OFFENCES AND THE REGULATORY STATE: A COMPARATIVE AND HISTORICAL INTRODUCTION

Introduction 161

Comparative Regulatory Function 161

The Canadian State in the International Context 167

The Combines Investigation Act

The History of Anti-Combines Legislation 169

Modifications to Anti-Combines Law Since 1960 181

The Enforcement Record 182

Conclusion 187

Footnotes 188

V. METHODOLOGY: COMPARATIVE CASE ANALYSIS

Introduction 192

The Comparative Method in Comtemporary Sociology 193

Case Study Design 197

Comparative Corporate Case Studies 199

Conducting Case Studies 201

Data Collection 202

Analyzing Case Studies 203

The Manifest-Latent Typology and Models of the State 208

The Exemplary Case Study 211

The Projected Study: Questions of Comparability 212

Comparability of Cases 213

Footnotes 216

VI. THE ENFORCEMENT OF THE COMBINES INVESTIGATION ACT, 1945-1986: (1) 1945-1973

Introduction 220

R. v. Eddy Match Company

Background 220

Judgement 223

Appeal 230

R. v. Canadian Breweries

Background 234

Legal Arguments 237

Judgement 239

R. v. British Columbia Sugar
Refining Company Limited

Background 243

Judgement 246

Appeal Considered 250

Aftermath 251

R. v. Electric Reduction Company
of Canada Ltd. (ERCO)

Background 252

Judgement 256

Wee Folks Diaper Service

Background 259

Adjudication 260

Anthes Imperial Limited

Background 261

Adjudication 265

Canada Safeway Limited

Background 266

Adjudication 267

Footnotes 270

VII. THE ENFORCEMENT OF THE COMBINES INVESTIGATION ACT, 1945-1986: (2) 1973-1986

R. v. Allied Chemical Canada Ltd.
and Cominco Ltd.

Background 278

Judgement 289

R. v. Canadian General Electric
Company Ltd. et al.

Background 286

Motion to Quash the Indictment 289

Judgement 289

R. v. K.C. Irving Ltd. et al.

Background 294

Judgement 295

Referral to the New Brunswick
Court of Appeal 298

Appeal to the Supreme Court 301

R. v. Thomson Newspapers,
Southam Incorporated et al.

Background 304

The Case for the Crown 307

Montreal 309

The Tory-Fisher Meetings 315

Ottawa 319

Winnipeg 321

Vancouver 323

"Black Wednesday" in Dollar Terms ...323

The Defence: Non-Suit Motion 324

The Crown 327

Charges Dismissed 329

The Case for the Defence 331

Final Submissions 333

The Crown: Final Reply 336

Judgement 336

Appeal Withdrawn 339

Pacific Northwest Bus Co. Ltd.

Background 339

Adjudication 340

Footnotes 342

VIII. ANALYSIS

A. Cross-Case Analysis

Introduction 349

Criminally Adjudicated Cases

Guilty Verdicts 349

Not Guilty Verdicts: The Evolving Judicial Interpretation of the Combines Investigation Act 354

Post-Irving 362

Anti-Combines Law and the Newspaper Industry 364

Conclusion 373

The Administratively Adjudicated Cases

Introduction 373

Wee Folks Diaper Service et al. 376

Anthes Imperial 377

Safeway 378

Pacific Northwest Bus Company 381

Punitiveness of the Act 381

Fines 382

Prohibition Orders 384

Alternative Penalties 384

Judicial and Extra-Judicial Strategies 388

B. The State and Law: A Theoretical Assessment 391

The Liberal Conception of the State and Law 392

Marxian Models of the State and Law 397

The Instrumental-Marxian Conception of the State and Law 398

The Structural-Marxian Conception of the State and Law 402

Conclusions 409

Policy Implications 413

Footnotes 420

BIBLIOGRAPHY 429

APPENDIX I 472

I. CORPORATE CRIME

Introduction

This chapter introduces the concepts of white-collar and corporate crime and traces their conceptual development. Definitional issues are considered and positions taken. The seminal contribution of Edwin Sutherland is then outlined, in particular his initiative in broadening the definition of corporate crime to include regulatory offences. The ensuing debate concerning the appropriateness of Sutherland's approach is briefly considered, as is the comparative lack of interest in corporate crime research.

The heart of the chapter consists of a discussion of Aubert's insightful essay concerning attitudinal ambivalence to white-collar crime at all levels of society and his notion that both the impulse to regulate and to violate economic regulations are normative, arising from deeply rooted social values giving most forms of white-collar crime a low level of social visibility.

The chapter continues with an overview of the meagre body of Canadian corporate crime research and an account of the "new criminology" debate concerning anti-combines offences and the regulatory state. The conclusion drawn from the literature is that it is atheoretical and instrumental in tone, based on an inadequate conceptualization of the state, and that this can only be corrected by giving equal consideration to all state models, by evaluating them in terms of their ability to account for patterns of regulatory enforcement.

The chapter closes with an enumeration of the questions central to the whole issue of corporate illegality and state regulation.

Preamble

In the field of criminology the area which has probably received less empirical and theoretical attention than any other is corporate crime. Most of the research that has been done has originated in the United States.

The significance of this omission is beginning to be appreciated with academic and public recognition that corporate illegality constitutes serious crime, an instance of "systematic immunity from deviance - defining by those who commit major social harms" (Schur, 1980:168-169). The two major studies of corporate crime completed to this time found such behaviour to be extensive and persistent (Clinard et al., 1979; Sutherland, 1961).

Acceptance of corporate criminality as a major area of criminological concern deserving of sustained empirical analysis necessitates a departure from the domain assumptions of mainstream criminology, which has not seen corporate law breaking as a matter for analysis. The theoretical orientation for the study of corporate crime is the "new criminology", since it has addressed itself to such issues as the role of the state and of law in advanced capitalist societies, political and economic power differences in capitalist class systems and the question of the accountability of "the powerful" to criminal law.

Development of the Concept of White-Collar Crime

The "first significant sociological statement about white-collar crime" (Geis and Meier, 1977:7) was that of Ross (1907/77), who drew attention to the "criminaloid", a "quasi-criminal" whose offences are not yet recognized by public opinion. Since the citizenry do not regard him as a criminal, the criminaloid easily maintains high self-esteem. He is a paradoxical figure enjoying popular respect while deriving an income from crime far surpassing that of more orthodox offenders. Exploiting opportunities evolving from industrialism, he is epitomized by the bank director who lends money to himself under various aliases and the union leader who calls a strike in order to be bought off by the employer (pp. 30-31).

A first, succinct definition of what he termed "white-collar crime" was offered by Sutherland (1961). He coined the phrase in order to call attention to an area of illegal behaviour excluded from the discipline of criminology. The concept was a vehicle with which Sutherland would critique traditional perspectives on the etiology of crime and delinquency (Dinitz, 1982:136).

> "White collar crime may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation" (Sutherland, 1961:9).

The definition is now widely recognized to be overly restrictive (Edelhertz, 1978:44-45; Pepinsky, 1974:225) and conceptually ambiguous (Geis and Meier, 1977:253-254; Kramer, 1984:16; Shover, 1978:37; Tappan, 1947/77:275; Vaughan, 1981:135).

Edelhertz (1978:44-45) notes that Sutherland's definition does not include economic crimes committed outside of one's occupation, such as personal income tax evasion or crime as a business, such as planned bankruptcy or confidence games within a business milieu. To include "crime as a business" within a definition of white-collar crime could be challenged as an unwarranted extension of the concept, essentially altering its meaning. It is to combine business concerns whose origins are criminal (criminal corporations), such as business "fronts" for organized crime activities, with crime incidental to legitimate entrepreneurial activity in pursuit of profit (corporate criminals). Edelhertz's own definition is that white-collar crime is:

> "... an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage" (Edelhertz, 1978:44).

For the purpose of this study white-collar crime is taken to be criminal behaviour arising from and incidental to a legitimate economic role including "blue-collar" occupations. For this reason the phenomenon might more appropriately be referred to as "occupational crime" (Quinney, 1963/77:285-286).

Geis (1981:184-185) points out that social status is an unhelpful characteristic if it necessitates distinguishing between upper- and lower-class persons committing the same offence; the focus should be on the offence regardless of who commits it. When it is considered that Sutherland included "poor bank tellers, shoe sales clerks, car dealers, and minor appliance repairers all as white collar criminals" the variables occupation, social status and respectability are clearly more obfuscatory than helpful (Klockars, 1977:232). Conceptual clarity might then be enhanced if the social status consideration was abandoned (Quinney, 1964/77:285).

Although Sutherland's definition referred to "persons", the major part of his work addressed corporate offences and occupational roles within them. The corporate and occupational elements were fused so that the crimes of corporations were equated with the crimes of management, "anthropomorphizing" corporate crime. This allowed Sutherland to speak of corporations as recidivists and habitual offenders[1] (Geis and Meier, 1977:67; Hopkins, 1980:199-201; Klockars, 1977:233, 240).

Sutherland also drew criticism for his assertion that offences handled by authorities other than criminal courts could justifiably be treated as crimes.[2] Sutherland offered several arguments in defence of this position: (1) since conventional criminologists supplemented criminal court statistics with those of juvenile courts, the crimes of businessmen could be culled from the records of administrative boards, bureaus and commissions such as the Federal Trade Commission. A large proportion of such cases were violations of criminal law, (2) Sutherland argued that behaviour which had a "reasonable expectancy of conviction" if it were handled by a criminal court should be regarded as a crime when a finding of fault is made by another agency. Not conviction but convictability should be the criterion, (3) the illegal acts of business people should be regarded as criminal "if conviction is avoided merely because of pressure which is brought to bear on the court or substitute agency" (p. 44). In Sutherland's view class bias by the courts rendered businessmen a degree of immunity from criminal prosecution, (4) the records of regulatory agencies often contained additional information concerning criminal cases since prosecutions often omitted some parties to collusion (Sutherland, 1940/77:43-45).

For Sutherland the crucial difference between the criminality of upper- and lower-class people was that the offences of the former were "administratively segregated" from the latter and proceeded with through non-judicial channels, thus escaping the stigma of a criminal conviction.

Sutherland employed this reasoning in his analysis of the offences of the 70 largest manufacturing, mining and mercantile corporations in the United States for the period approximately 1890 to 1945. To this end Sutherland perused the records of federal, state and, in some cases, municipal courts as well as such regulatory bodies as the Federal

Trade Commission, the Securities and Exchange Commission and the National Labour Relations Board, supplemented with national data from the "New York Times". He obtained information on offences pertaining to such matters as restraint of trade, misrepresentation in advertising, patent, trademark and copyright infringement, violations of the labour code, financial fraud and violation of trust (Sutherland, 1961:18).

From these sources Sutherland amassed data on 980 violations, only 158 of which had been disposed of by the criminal courts. Every corporation was guilty of at least one offence with a maximum of 50. Sixty per cent of the corporate offenders had been dealt with by criminal courts with an average of four convictions each (pp. 20-25).

In Sutherland's view the great majority of the 980 violations could be treated as crimes since they constituted social injuries prohibited by the state, for the violation of which a statutory penalty was prescribed.

The Post-Sutherland White-Collar Crime Debate

Sutherland's attempt to push the definitional boundaries of crime into the territory of business regulatory infractions met staunch opposition from the legalistic perspective represented by Tappan (1947/77), who countered:

> "Only those are criminals who have been selected by a clear substantive and a careful adjective law, such as obtains in our courts" (pp. 277-278).

For Tappan only the criminal law offered a practicable definition of crime. Pepinsky (1974) charged that Sutherland's criterion of social injury blurred the distinction between criminal and civil offences and could not be operationalized; any state response involving a payment beyond damage caused would be seen as a penal sanction (p. 225).

Sutherland's failure to define white-collar crime unambiguously magnified the confusion. Sutherland's definition became the starting point for "a barrage of speculative attempts to refine and redefine white-collar crime" (Geis and Meier, 1977:254). For Newman (1958/77: 52) and Quinney (1964/77:286) the essential fact about white-collar crime is that it occurs in the course of the offender's legitimate occupation. It is the offence and not the offender that should be of primary importance. This necessitates the inclusion of offences by persons who do not appear to have high social standing. As long as definitional confusion persists the task of theory and typology construction is suspended. Quinney (1964/77:286) favours categorization in terms of behaviour directly related to one's occupation with "occupational crime" as a more appropriate identification. Thus while price fixing, embezzlement and fee splitting would be included, personal income tax evasion and rent control violations would not (pp. 285-286).

Geis' (1974; 1981) preference for "avocational" and "upperworld" crime does not clarify the situation.[3] The first refers to offenders who do not think of themselves as criminal, derive most of their income from non-criminal sources and are deterrable by criminal sanction; while the rubric encompasses occupational crime it also includes shoplifting (Geis, 1974:273). The latter designation is intended "as no more than a very rough contrast to 'underworld'" (Geis, 1981:185). It includes offences not defined in criminal terms since law enforcement discretion and governmental policy changes can lend the final designation an arbitrary quality. Criminologists should acknowledge the political nature of criminal justice and probe for reasons for the diversion of cases away from the criminal justice system, but to proclaim criminal deviant behaviour beyond the boundaries of criminal, civil and administrative law is to enter "definitional quicksand" (p. 183).

Jackall (1980) rejects Geis' legalistic approach, believing the emphasis should be on the occupational morality that generates social harm of a criminal and non-criminal nature. For Jackall the subject of white-collar crime lies less with criminology than with the "sociology of corporate and governmental scandal" (p. 355).

Pepinsky (1974) prefers the term "exploitation" to that of white-collar crime as a more operational and less socially biased conceptualization. He is in agreement with Jackall that there is a need to include social injustices flowing from the actions of the economically powerful whether they are statutorily addressed or not. For Klockars (1977:237), Pepinsky's extra-legal approach "falls so far from any conventional use of the concept of crime that it is preposterous".

Definitions of Corporate Crime

Definitional ambiguity concerning white-collar crime is reflected in the fact that (in using the expression) early writers such as Sutherland (1961) and Hartung (1950/77), were in fact referring to the sub-area of corporate crime. This is apparent from Hartung's definition.

> "A white-collar offence is defined as a violation of law regulating business, which is committed for a firm by the firm or its agents in the conduct of its business" (p. 154).

If the term white-collar crime is retained some distinction must be made between crimes for personal reasons and those in accordance with corporate policy, practices and goals. Clinard and Yeager (1980:18) do so in their dichotomy of "occupational" and "corporate" crime. In the first instance the corporation is the victim, as in the offences of embezzlement and "insider trading" in which the employee uses privileged corporate information for financial gain. Apart from corporate employees occupational offenders could be lawyers, doctors, politicians, labour leaders or others engaged in such offences as tax evasion, used car fraud, misappropriation of public funds and kickback schemes. Corporate crimes result from decisions made by administrative groups or coalitions in their role as employees in which the primary objective is corporate advantage.[4]

Clinard and Yeager (1979:165) define corporate crime in organizational terms.

> "Corporate crime is organizational crime which occurs in the context of complex and varied sets of structured relationships between boards of directors, executives, managers, and other employees on the one hand, and between parent corporation, corporate divisions and subsidiaries on the other".

Kramer (1984:17-18) accepts the above dichotomy, identifying corporate crime as a sub-area of both white-collar crime and organizational crime. His definition is also a clear departure from Sutherland's anthropomorphic approach, emphasizing the qualitative distinction between personal and organizational crime, and is adopted for the purpose of this study.[5]

> "By the concept of "corporate crime" ... we wish to focus attention on criminal acts (of omission or commission) which are the result of deliberate decision making (or culpable negligence) by persons who occupy structural positions within the organization as corporate executives or managers. These decisions are organizational in that they are organizationally based - made in accordance with the operative goals (primarily corporate profit), standard operating procedures, and cultural norms of the organization - and are intended to benefit the corporation itself" (p. 18).

Conklin (1977:13), in contrast, lumps both occupational and corporate crime under the heading of "business crime". His definition addresses only the economic crimes of corporations and individuals in the course of their employment and takes no account of the physical co[illegible] of corporate law breaking, as in violations of safety and health regulations, pollution and the promotion of dangerous products. His definition is also limited to the commercial and industrial sector, including embezzlers and employee thieves while excluding the crimes of lawyers, doctors and other professionals.

Schrager and Short (1978:411-412) acknowledge the physical cost of crime by corporations and other organizations.

> "Organizational crimes are illegal acts of omission or commission of an individual or a group of individuals in a legitimate formal organization in accordance with the operative goals of the organization, which have a serious physical or economic impact on employees, consumers or the general public".

Edelhertz (1978) offers a four-part typology encompassing the main variations of white-collar crime and crime as a business. These are classified as: a) personal crimes (such as tax evasion and fraud), b) abuses of trust in the course of one's employment (for example, embezzlement, expense account "padding", conflict of interest), c) business crimes (food and drug violations, fraud against the government and other forms of misrepresentation), d) "con games" (frauds involving bankruptcy, home improvement, pyramid selling and so on), (Dinitz, 1982:141; Edelhertz, 1978:59).

The victims of corporate crime have been identified as stockholders, employees, customers and, in the case of offences such as pollution and antitrust, the public at large (Ermann and Lundman, 1982:23-30). On occasion, however, the victim may be another organization such as a government department, as in a case detailed by Vaughan (1980) in which the Revco pharmaceutical chain systematically defrauded the Ohio Department of Public Welfare, which paid Revco over half a million dollars in excess of Medicaid funds by means of a computerized double-billing scheme.

Empirical Neglect of White-Collar Crime

Attention has been repeatedly drawn to the paucity of research on white-collar crime and particularly corporate crime (Bequai, 1978:5-10; Box, 1983:18; Clinard et al., 1979:xiii; Conklin, 1977:12; Geis, 1981:185; Kramer, 1984:13; McDonald, 1976:229; Vaughan, 1981:137).

After Sutherland's work criminology "tended merely to pay lip-service to the significance of upper-class and corporate crime ..." (Schur, 1980:171). Work was "idiosyncratic rather than systematic", focusing qualitatively[6] on specific subjects without any attempt to integrate findings (Geis, 1974:284-285). Most of this work has addressed occupational rather than corporate crime (Clinard, 1983:12).

Vaughan (1981:137) sees the decades 1940 to 1960 as a "classical period" in white-collar crime research in which differential association was the dominant theoretical position.

> "The research of the period reflected the amorphous nature of knowledge at the time. Empirical studies groped for some kind of theoretical integration and cumulative insight. Researchers were preoccupied with determining the extent of violations and possible explanations. They examined particular industries or violations of particular laws, resulting in interesting findings in discrete areas but little integration. If any consistency could

> be found in the research that emerged, it lay in several attempts to test Sutherland's perspectives" (p. 136).

Clinard (1946/77) examined violations by business of the wartime Office of Price Administration (OPA) price and rationing regulations. Many of his findings would become familiar with repetition in future studies. Cases were prosecuted on a selective basis though infractions were extensive; of those businesses investigated 57 per cent were found to be in violation (Clinard accepted Sutherland's criterion of convictability). Penalties "were in general extremely mild" (p. 90) although almost all offences were criminal acts. Offenders seldom had criminal records and regarded themselves as law breakers rather than criminals and were seen as such by the judiciary. Differential association was found to be of limited usefulness, in that Clinard felt it failed to adequately explain why businessmen familiar with violation techniques and associating with peers equally knowledgeable, did not themselves offend (p. 98).

Lane (1953/77) proceeded where Clinard left off; why did some businessmen defy regulatory laws when others did not? He obtained his data from several sources, interviewing management in 25 large New England industrial firms and the heads of several regulatory agencies, and analyzing decisions of agencies and regulatory violations in the New England shoe industry. Both the "association" (degree of familiarity with patterns of behaviour conducive or not conducive to criminality) and "isolation" (lack of exposure to patterns of behaviour favourable or unfavourable to criminal behaviour) aspects of Sutherland's theory were useful in explaining some violations, while other offences were attributed to marginal or declining status within the industry and to the ambiguity of some laws (pp. 102-114).

Hartung (1950/77) examined OPA violations in the Detroit wholesale meat industry for the period December, 1942 to June, 1946. He found 83 firms and 132 persons had been responsible for 195 offences (pp. 158-159). Differential association did not provide a complete explanation but was thought superior to non-sociological accounts. A unique feature of such offences was that violations originating at the wholesale level were multiplied in a chain sequence as excess charges were passed on to customers (pp. 161-162).

Hartung's findings earned him a debate with Burgess (1950/77) on the issue of whether OPA violations were "really" crimes. Although Hartung was on firm legal ground, Burgess argued that the definitive criteria were how offenders and the public viewed the offences. In Burgess' view neither saw regulatory infractions in the same light as street crime (pp. 164-167).

Cressey (1950; 1953), by an analytic induction process, hypothesized that embezzlement was the product of a non-shareable problem, the perception of an opportunity to "solve" the problem by violation of trust and the adoption of culturally provided rationalizations. All conditions were found to be present in a sample of 133 convicted embezzlers in the United States (1953:39).

In a study of income tax evasion in one Wisconsin city Groves (1958/77) estimated net reported rental income to be approximately 51 per cent of actual receipts. Ball (1960/77) found general compliance with rent control ceilings among Honolulu landlords despite a widespread feeling that the controls were unfair; over 90 per cent of violators saw the law in this way (p. 188).

Quinney (1963/77) accounted for the incidence of violation of laws and regulations governing the compilation and dispensing of prescriptions by pharmacists within a dual framework of occupational norms. The profession was oriented towards "professional" and "business" ethics, the latter placing greater emphasis on monetary gains. The likelihood of deviating from regulations was found to be associated with a preponderant adherence to "business" over "professional" principles. Deviance was seen as a product of structural strain within the profession and was therefore generalizable to other service professions (p. 195).

Aubert and the Ambiguity of White-Collar Crime

Aubert (1952/77) introduced a structural approach in suggesting that the phenomenon of white-collar crime could only be understood by broadening the analytical framework and accounting for the social processes behind the enactment of the corresponding criminal legislation (pp. 168-169). In an approach heralding contemporary conflict theory Aubert argued that the root values and social norms embodying these and other laws should be identified and objectively analyzed. An holistic stance embracing criminal behaviour, law, penal sanctions and the social structure would yield new theoretical insights. White-collar crime legislation was quintessentially a product of structural conflict, and it was this feature which explained the ambiguity characteristic of it. Rather than entering into "futile terminological disputes" criminologists should make the ambiguous nature of white-collar crime the epicentre of their analysis, and the appropriate place to begin was by reflecting on the dialectical relationship between "law-in-books" and "law-in-action". A focus on the former reveals nothing of the idiosyncratic nature of the enforcement of such laws. Social structural conditions may make law breaking a normative response in a context of group support, particularly for businessmen whose social status is derived from their economic and political power. The businessman as citizen adheres to "a universalistic obligation" to obey society's laws while recognizing a "particularistic obligation" to repudiate only the most socially injurious acts (p. 174). In Aubert's view such laws were also less likely to be routinely enforced because they did not command public support to the extent other criminal laws did (p. 173). As a consequence an attitudinal ambivalence prevails among citizens, the business sector, lawyers, judges and academics whose vacillation is symptomatic of structural conflict and potential change. Since such laws are more symbolic than instrumental, the expectation of structural change may be an illusion, but is nonetheless functional in defusing social conflict.

A number of studies have empirically supported Aubert's contention as to the "political compromise" content of white-collar crime regulation. In doing so, however, several have rejected Aubert's pluralist premises. For Sutton and Wild (1978) the focus should not be legislators or administrators, but the political and juridical institutions themselves.

> "Instead of demanding why white collar laws are so poorly enforced, perhaps the question should be why, since they are so unenforceable, do such laws exist in the first place?" (pp. 180-181).

Viewed in the context of Australian national and state politics white-collar crime legislation "may be seen as a barometer of structural conflict and change" (p. 181). There was nothing to suggest that legislators of anti-corporate laws intended anything but instrumentally effective edicts. Nevertheless, once enacted attorneys-general found such laws unwieldy to implement and turned to alternative means of enforcement.

This anomaly is accounted for by the Weberian axiom that corporate capitalism requires legal calculability as the sine qua non of the accumulation process (Hagan, 1985:113). However, criminal law still upholds an individualistic ethos and is likely to prove an ill-fitting mechanism for the monitoring of corporate affairs. As embodiments of the bureaucratization-rationalization process corporations are admirably positioned to shape legislation, addressing corporate affairs even while evading the ambit of current law. A structural irony is then discernible, that the more formally rational law becomes "the more it favours the more formally rational organizations, that is, the corporations themselves" (p. 189). The only consequence of the proliferation of law may be substantive injustice and the retrenchment of inequality (p. 195).

Carson (1974; 1980) examined the structural forces behind early British factory legislation, in pursuit of which the reform movement received support from the major factory owners eager for stability, calculability, and a disciplined labour force (Carson, 1980:149-150). In the course of political struggle the rhetoric shifted to the symbolic level as the morality of industrialism itself came into question. The subsequent political compromise was legislation condoning the factory system while attempting to eradicate its worst features (Carson, 1974:132-135).

The legislation crystalized a basic contradiction; enactment was attributable to an "internal dynamic or logic", within the industrializing social order, for regulation while the entrepreneurial practices targeted were integral to the "structure, organization and ideology of the productive process" (Carson, 1980:162). This circumstance encapsulates the ambiguity between declared intention and instrumental inefficacy, a pattern that has continued to modern times (Carson, 1970).

According to Shover (1980) the passage of the Surface Mining Control and Reclamation Act in 1977 regulating strip coal mining in the western United States was only made possible by the cooptation of the environmental lobby by the industry. After a protracted opposition to legislative proposals the mining companies agreed to a "realistic and workable" law compatible with industry long-term planning. What appeared to be a corporate defeat was in fact a "propitious capitulation" since the legislation imposed few mandatory requirements and had been composed in close consultation with the industry (p. 119). For a small risk of criminalization the industry attained stability, predictability and socialization of costs, all of which facilitated capitalization and planning.

What had been initially a pluralistic struggle became a "containable" corporate management problem as the debate became increasingly constricted by an industry view of the practicable (pp. 121-122).

The enforcement of the law suggests that "even in the most stringently mandated regulatory agencies a potential for discretion exists at the field level" (Lynxwiler et al., 1984:155). Although the legislation imposed few inflexible requirements on the industry, 115 performance standards were listed and inspectors were given explicit and detailed procedural instructions with a view to eliminating discretion. Interviews conducted with inspectors by the authors revealed that a rapport was quickly established between inspectors and major coal companies, whose environmental specialists demonstrated knowledge and expertize equal to or greater than that of officials. Capable of pre-empting prosecution at the negotiation stage, the largest companies came to be seen as more "responsible" than their minor industry partners, possessed of fewer means of diverting regulators.

In another environmental sector, water pollution, negotiation was statutorily institutionalized in "conferences" involving state and federal regulations, polluters and anti-pollution experts (Yeager and Clinard, 1979). Offences continued to be technical infractions, to be resolved by the confabulation of experts whose sole objective was abatement, despite an awakening of public opinion on the issue. McCormick (1977) has suggested that public indignation such as that which precipitated the passage of the Sherman Act will not be sustained unless enforcement is rigorous from the outset. Unless a coterie of deviants is generated the original criminal intent quickly becomes modified (p. 36).

Post- "Classical" Period

The "classical" period was followed by an empirical hiatus of about a decade before academic interest revived in the 1970's in the wake of the consumer and environmental movements and a series of corporate scandals[7] (Kramer, 1984: 13; Vaughan, 1981:137).

> "For example, widespread publicity has been given to the Watergate investigations and the illegal Nixon political contributions; the questionable or illegal foreign payments by more than 300 large corporations; the apparent role of ITT in heading off federal antitrust action by donating heavily for the 1972 Republican National Convention; the political contributions of the Associated Milk Producers to obtain an increase in milk price supports; the flagrant violations of Equity Funding; the conviction of Allied Chemical for polluting the James River; the recalls and suits involving Ford Pintos; and Firestone's recall of more than 10 million defective tires" (Clinard and Yeager, 1980:14).

The only comprehensive analysis of corporate crime within a defined time period is that of Clinard et al., (1979), the first large scale research since Sutherland. The records of 25 regulatory agencies in the United States were examined for offences involving the 477 largest publicly owned manufacturers and the 105 largest retail, wholesale and service firms. A total of 1,553 decisions were recorded involving over 60 per cent of the sample for the period 1975 and 1976. Large corporations were found to be responsible for about 70 per cent of serious violations[8] with offenders disproportionately located in the oil, auto and pharmaceutical industries. Warnings were used twice as often as any other response. Of 56 executives federally convicted only 16 went to jail for an average sentence of 37.1 days, actual time served being less. Fines levied on corporations were extremely lenient; over 80 per cent of monetary penalties were for $5,000 or less and most were in the $1,000 range. Less than one per cent were over $1 million. A general negative relationship was found for corporate size and amount of fine (pp. xx-xxii).

Corporate Crime Research in Canada

The small body of work on corporate crime by Canadian criminologists is attributable to a few sources. Most of this work has focused on the Combines Investigation Act, the main statute addressing itself to corporate behaviour. The consensus is that the law has always been and remains virtually unenforceable and was probably never intended to have any other effect.

Goff and Reasons (1978) offer a critical analysis of the history of anti-combines legislation and its enforcement for the period 1889 to 1972. Their historical analysis supports the contention of Chambliss (1976:67) that some criminal law emerges during periods of intensified class conflict and that the intent of the legislation is to defuse that conflict, not to call the powerful to account. Goff and Reasons are able to show that the law owes its origins and frequent revisions to periodic popular protest against the steady monopolization of capital and its consequences in the form of inflation and unemployment. The end result of all the legislating and amending is that today Canada's competition laws are "among the weakest in the Western World and its economy among the most concentrated" (Maclean's, July 18, 1983:36).

The main reason for the paradox is that the legislation has always been phrased ambiguously enough to defy enforcement. Virtually no behaviour is prohibited per se; instead competition must be restricted "unduly" and "unreasonably" and it must be shown beyond a reasonable doubt that the detriment to the public was intended. The result has been an enforcement record which is "sporadic, hit-and-miss and political" (Snider, 1980:365). Budgetary restraints have necessitated that enforcement be aimed chiefly at smaller firms and even here prosecution has not been undertaken "unless there is an excellent chance of conviction based upon legal criteria" (Goff and Reasons, 1978:91). The consequence of this has been that Canada's dominant corporations have been able to arrange their affairs to their liking with only minimal state "interference".

Of chief concern to Canada's corporate elite in their pursuit of monopolistic power has been their ability to appropriate the assets of competitors by means of mergers, and it is precisely in this area that the Combines Act has been weakest. Although certain forms of merger have been illegal since 1923 none were prosecuted before 1960. Of the 3,572 mergers after 1960 only nine were prosecuted. Since 1923, .003 per cent of all mergers were prosecuted, .0005 per cent successfully (pp. 103-104), a conviction rate that "strains credulity" (Snider, 1980:355).

In their conclusions Goff and Reasons see Canada's anti-combines laws as a response to corporate requirements rather than a counter to corporate power. At no time has monopolistic economic power been seen by governments as unreservedly bad for Canadians. Anti-combines laws have been a failure "because they are incompatible with an efficient, growth-oriented, internationally competitive capitalism" (Goff and Reasons, 1978:132).

Snider (1980) analyzes enforcement of the Combines Investigation Act for the period 1961-1973, and other corporate laws for a six month period from 1974 to 1975.

Misleading advertising is seen as the least threatening (and the most prosecuted) provision of the Combines Investigation Act. Even so the number of cases handled by the Act was far below that of most street crimes (allowing for the respective numbers of potential offenders). Section 33, concerning mergers and monopolies, showed little enforcement activity.

Much of the data was unhelpful. Cases were dropped without explanation and penalties, when laid, were rarely punitive. In no case was restitution demanded; indeed the principles of punishment routinely cited by criminologists for street crime enforcement were conspicuously absent here. As in the Goff and Reasons' study large corporations were the principal beneficiaries of lenient enforcement.

Snider perceives the major weaknesses of the Combines Investigation Act to be vague wording, weak penalties and obstacles to enforcement in administrative procedures themselves; the decision to prosecute lies with the Attorney General of Canada and is therefore open to political considerations. Reliance on public complaints to institute proceedings guarantees few cases each year. Consequently enforcement is "weak and capricious" (p. 362).

A conflict rather than a consensus approach is the explanatory key:

> "It seems that those who control the major economic resources have been able to use their power to prevent the introduction of laws which threaten their position; to impede the enforcement of any weak laws the political elite have been forced to exact" (p.367).

Reasons and Goff (1980) compared the evolution and enforcement of anti-combines laws in Canada with those of Britain, Australia and the United States. A similar picture emerges in each case; ineffectual laws, symbolic of a competitive ideal, invariably arising in periods of political and economic crisis. In each case "law-in-the-books" bears little relation to "law-in-action" (Chambliss and Seidman, 1982:2); the constrained are specific, troublesome capitalists, not the capitalist class as a whole.

An equally revealing comparative analysis is that of enforcement of corporate crime against that of traditional Criminal Code offences. Snider (1982) considers the Combines Investigation Act, Food and Drugs, Packaging and Labelling, Hazardous Products and Weights and Measures acts for corporate matters, and the Criminal Code sections for theft over and under $200, possession of stolen goods, break and enter and auto theft; this latter group accounts for 70 per cent of charges laid under the Criminal Code. The period of analysis is 1949 to 1972.

Maximum prison terms were higher for traditional crimes, which Snider attributed to a sentencing philosophy which perceived businessmen to be undeserving of incarceration.

Fines were higher for corporate offences but may have represented a smaller proportion of income, while criminal gains are typically far greater in cases of corporate crime.

In this period probation and fines came into common use for street crime, as did the Order of Prohibition for corporate crime. While large numbers of penurious Canadians were jailed for non-payment of fines, no one in this period was incarcerated for defying an Order of Prohibition; in any case no follow-up procedure existed to ensure they did. For corporate offences most enforcement resources were devoted to offences by small business; misleading advertising, the most enforceable section of the act, was prominently featured. In a sense this proved convenient, since Snider considered misleading advertising the corporate offence which most approximated traditional theft. In comparing the two, theft was prosecuted more often and more severely.

In interpreting her findings, Snider hypothesizes the two types of law serve very different purposes. Traditional criminal law ensures a degree of social order essential for capital accumulation to take place, while "anti-business" laws serve primarily a legitimation function in appearing to restrain business. The result is weak enforcement of laws which address themselves to corporate decision making. While there is evidence that Canadians do not necessarily approve of these enforcement priorities (McDonald, 1976:232) public opinion is not mobilized on the matter and so the state's definition of the "crime problem" goes unchallenged.

Sutherland (1983:55) concluded that businessmen enjoyed a greater degree of protection from the consequences of their criminal actions than did juveniles. For Canada, Snider and West (1980) also found that juveniles enjoyed less freedom. Apart from a number of "status offences" for which adults are not liable, juveniles also account for much police time in the "war" against street crime; in 1969, 40 per cent of theft charges involved minors. While the weight of the law is much in evidence, little has been done to alleviate the status frustrations of this group, such as unemployment. Instead, with the passage of time juveniles have increasingly been portrayed as a threatening group.

For corporate offences attempts were made to garner data at the municipal (Toronto), provincial (Ontario), and federal levels, but only the federal data was usable. Municipal authorities protected the identity of offenders; no health board in Toronto, for example, would release the names of anyone charged (p. 222).

Nevertheless, Snider and West were able to establish that little enforcement activity had taken place. No charges had been laid for years under Toronto municipal health regulations, nor did inspectors see anything wrong in this. In environmental matters minimal provincial enforcement was the rule in Canada's most industrialized province, and an inadequate body of inspectors ensured that this state of affairs would continue. The Ontario Securities Commission confined itself to the disreputable, "confidence trickster" element (p. 224). Widespread employer theft and violation of work safety regulation received only cursory attention from government.

Federal data were comparatively better but systematic data for any of the acts only existed from 1974 onward. Maximum fines were low and were rarely imposed anyway. In only one instance was restitution demanded. Large corporations were more likely to receive only an Order of Prohibition after a finding of guilt (pp. 233, 235).

Beyond the fact of inadequate funding of regulatory agencies, beyond their tendency to adopt the corporate perspective and the unhelpful nature of the laws as written, the root cause of this double standard of justice is located by Snider and West in the economic power of business and the ideological domination which emanates from it. The decisions which determine how vibrant the Canadian economy is to be are private ones; the state must secure the "confidence" of corporate capital, not vice-versa.

Reasons, Ross and Peterson (1981) examined corporate violations of Canada's labour safety code and in so doing helped to dispel the myth that corporate crime is essentially non-violent. Canadians are more likely to be victims of violence at the workplace than outside it, 18 times are likely to die and 28 times as likely to be assaulted (p. 26), and a significant proportion of these incidents are due to the employers' failure to observe safety regulations or to organizational pressures on workers' job performance. Occupational homicide is shown to be the third most common cause of death in Canada, whose mortality rate is higher for specific high-risk industries than that of other industrialized countries such as the United States, Britain, West Germany and Japan (p. 6).

Despite these statistics the chances of detection of labour safety violations by regulators and a punitive response from the state are slight. Jail sentences are provided by most provinces but no one at the time of writing had been incarcerated for a breach of the code (p. 7). Employers were shown to have little to fear from the criminal law since inspectors commonly shared management's perception of "problems" and in some instances were recruited from management ranks (p. 214). Almost invariably violations of the law produced only a citation for technical violation of regulations (p. 208).

The authors argue that because of differences in power between employers and workers the former enjoy the prerogative of defining "acceptable risks" (p. 138).

Finally, Larsen (1981) discusses two celebrated Canadian cases of corporate criminality from the late 1970's, the "Harbourgate" bid-rigging case and corruption charges arising from the "Skyshops" affair. Larsen cites evidence suggesting political intervention on behalf of the Skyshops company; a Canadian senator was charged with influence-peddling and conspiring to offer and/or accept a bribe, but was subsequently acquitted. Two businessmen were convicted of conspiracy to bribe and were fined $25,000 each and sentenced to one day in jail (p. 27).

The "Harbourgate" matter, which resulted in several convictions of executives and their companies and prison terms of two to five years, also involved allegations of political misconduct (p. 26).

Larsen contends that the two cases illustrate an ability by the economically powerful to manipulate legal procedures to their advantage and "the systematic bias of criminal justice on behalf of the privileged" (p. 27).

Summary

Much of what Vaughan (1981) has said of the unsophisticated and atheoretical nature of corporate crime research in the United States between 1940 and 1960 could be reiterated for Canada to the present time. The aforementioned Canadian work constitutes a survey of the regulatory performance (with some overlap of subject matter) over a range of legislation including the Combines Investigation Act. The studies focus on the extent of infractions of particular statutes and offer explanations for a weak regulatory response formulated almost entirely at the instrumental level (such as political intervention, corporate pressure on legislators, criminal justice bias and regulatory protectiveness). As in the American work little attempt is made at theoretical integration. What appears most obviously to be lacking in this work is a thorough analysis of the nature of the Canadian state and its role, together with that of regulatory law, in Canadian society.

To assess the extent to which the "new criminology" perspective has factored the state and law into its discussion of corporate law breaking, the broader literature which has emanated from the paradigm will now be reviewed, with emphasis given to Canadian references and to regulatory law.

The New Criminology, the State and Regulation

The "new criminology" has recognized the importance of a theory of the state in accounting for crime in advanced capitalist societies (Pearce, 1976:56-58; Quinney, 1980; Taylor, Walton and Young, 1973:273-274). This argument is made a fortiori when corporate crime is under analysis. Legal institutions, ideological formulations such as "law and order" and the relations of production are interrelated, and the mechanism accomplishing this is the state[9] (Maclean, 1986:10). The actions of the state apparatus are therefore central in any explanation of the social location of crime and patterns of criminal behaviour and of law enforcement. The state is the link between capital and criminal justice (Ratner, 1986:28).

The compelling need for an understanding of the Canadian state becomes clear when an attempt is made to explain the history and enforcement record of anti-combines laws. A consensus-pluralist problematic is ill-equipped to account for the state's pusillanimous response to the rapid concentration of capital ownership which has proceeded for almost 100 years in total disregard of law-in-the-books and has attained such dimensions that business itself has become concerned at the economic power accumulated in a few hands and at how little new wealth is being created[10] (Edmonton Journal, October 20, 1986:B5; Francis, 1986:1, 5-6). A conflict orientation provides a better "fit" than that of a consensus-informed mainstream approach to a record of non-operative competition policy (Ratner, 1986:36). So unhindered has Canada's capitalist class been in structuring the economy for their own purposes that at first sight an instrumental theory of the state seems called for.

> "The strongly instrumental flavour of corporate elite enterprise in Canada does not mean that reforms are never instituted; rather they are accepted by powerful interests when resistance to them is no longer feasible. Moreover, lax enforcement and legal challenges to the new regulations tend to result in their de facto invalidation, again demonstrating the consistent bias of Canadian criminal justice in favour of a privileged sector. In essence, the enduring pattern of unpunished corporate crime in Canada gives credence to the instrumentalist variant amongst the new-Marxist perspectives. Some state regulation is necessary to prevent internecine competition between fractions of capital and to give limited expression to "pressures from below", but corporate interests, heavily represented in legislative bodies and reinforced by the extreme vulnerability of the resource-based Canadian economy, usually prevail" (p. 37).

A major reason why "new criminologists" have regarded the state as central to any theorization of high rates of corporate illegality and low levels of enforcement is that the state in capitalist societies is demonstratively not neutral in mediating between economic interests and has consistently broken its own laws in defence of capital.

A conflict approach shows that the primitive accumulation process itself, first in Europe and then in North America, was carried out by means of large-scale theft and unrestrained violence. In Britain, the harbinger of industrialism, large fortunes essential to industrial investment were made by means of periodic "land grabs" from the late fifteenth century onward, during which tens of thousands of families were displaced from land holdings in total violation of legal rights in common law and consigned to a life of itinerant destitution, the future industrial reserve army of labour (Marx, 1954: vol.I:671-693). The law, having served as the instrument by which land thefts were accomplished, then became the means of suppressing acts of rebellion by the subject classes (Chambliss, 1964; Rusche and Kirchheimer, 1975: Scott and Scull, 1978; Thompson, 1975).

In the United States the indigenous peoples were massacred in large numbers and progressively ghettoized while the land was worked by abducted black slave labour.[11] Industrialism fed on the labour of European and Chinese immigrants at subsistence wages and in inhumane working conditions. Indeed much of the corporate activity of the early industrial period in the United States, when the infrastructure was being laid, was illegal even by the normative standards of the time "but was permitted to occur because the control of the rich over the government and the legal system allowed the privileged to be lawless" (Krisberg, 1975:41). These were the conditions in which the fortunes of such folk heroes as Morgan, Carnegie, Rockefeller, Astor and Harriman were made (p. 40).[12]

For Canada Myers (1972:135-138, 150-167) has chronicled a similar story of aboriginal genocide, land fraud, exploitation of settlers (by the Hudson's Bay Company); huge gifts of money and land to railroad companies (at a time when directors of railroads could simultaneously serve in cabinet), a history of private enterprise at public expense presided over by the state, which has continued to the present time. Such an incestuous relationship between the state and business was an invitation to self-dealing, bribery and other forms of corruption (pp. 143-144, 153-154, 179-181, 196-200). As the boundary between public and private life became blurred so did that between acceptable business practice and corporate crime.

In the light of this history radical criminologists have proclaimed the capitalist class and agents of the state to be the chief law breakers (Platt, 1975:95-97; Herman and Julia Schwendinger, 1975:136-137; Young, 1976:15). While invoking "law and order" against the working classes, those who wield state power have displayed a cynicism about legality and a readiness to break the law when lawful behaviour does not serve their purposes (Krisberg, 1975:52). Instances of this in recent years have been seen in a series of illegal actions by the RCMP and other police forces in Canada in the 1960's and early 1970's such as mail openings, theft, issuing of fake communiques, break-ins and destruction of property, all in the name of "national security" (Sawatsky, 1980:238-251), none of which was prosecuted (Maclean's, September 5, 1983:14).

Liberal democratic states, in defence of capital, prefer to remain within the bounds of legality and constitutionality (Krisberg, 1975:52; Michalowski, 1981:48) but the adherence to legality of corporate capital itself remains pragmatic and conditional (Pearce, 1976:84). The use of the War Measures Act in Canada in 1970 and the creation of a Civilian Security and Intelligence Service whose jurisdiction has been poorly defined indicate the "elasticity of liberalism" (Visano, 1985:52).

Liberal democracies are perceived by critical criminologists to be in a state of crisis precipitated by a global recession, in reaction to which no uniform state response is discernible (Taylor, 1983:6). Canada is distinguishable from the American and British experience by the relative absence of a shift to the political right and the kind of class polarization evident in Britain (Ratner and McMullan, 1983:34).[13] In Canada, while much of western and Atlantic Canada remains mired in recession, faith in the ability of capital to solve its problems is undisturbed; hence, for Taylor (1983:13) no hegemonic crisis exists in Canada while Ratner and McMullan (1983:34) see the question as a matter of degree rather than an "either/or" issue. Turk (1982:34) asserts that hegemony is maintained as long as most citizens believe, correctly or otherwise, that their life chances are improved or maintained by state policy. By this definition no advanced capitalist state is currently undergoing hegemonic crisis.

The Canadian state is securely bourgeois and, in the view of critical criminologists, relatively authoritarian[14] yet successfully presents itself as "liberal", a nomenclature that conceals an increase in police and corrections personnel exceeding the rate of population growth,[15] and excessive domestic surveillance by a Civilian Security and Intelligence Service (Maclean's, December 14, 1987:19). In Taylor's view (1983:28) a "strong state" has unobtrusively emerged in Canada "with overwhelming and unaccountable powers to punish, contain and/or reform a larger proportion of the population than ever before". The overall control apparatus has expanded under the guise of "community corrections" and "diversion" programs, while the numbers incarcerated have continued to rise and the "flow-through" rate of the incarcerated population has accelerated (Chan and Ericson, 1985; Hylton, 1983; Taylor, 1983:141-142).

A feature of the crisis in Canada and other capitalist countries has been an attempt to reduce social welfare spending and to "claw back" from working people concessions granted by the dominant class in the post-war period (despite the potential loss of legitimation since the ideological value of the provision of the "social wage" has always been understood by the political and economic elites: Taylor, 1983:126).[16] "Faced with mounting debt, the state has eroded social expenditures on programmes where political resistance was least likely to occur" (Moscovitch and Drover, 1987:38). Encroachments on social welfare spending were contained in the Mulroney government's proposal to de-index old age pensions and to end the principle of universality of access to child supplement payments (an idea first broached by the Liberals in 1982: Taylor, 1983:140). Another obvious target is the burgeoning cost of unemployment insurance payments at a time of high structural unemployment. Accordingly, the Forget Commission has proposed a reduction in eligibility (Globe and Mail, December 4, 1986:A1, A6), a motion that does not appear to be popular.[17]

The Canadian state has employed a heterogeneous tactical package embracing legitimation and control procedures. Legitimation has been served by the repatriation and reformulation of the constitution to include a Charter of Rights, a major objective of which was to counter Quebec separatism. In conjunction with this have been provisions for enhanced state control including covert monitoring of individuals and groups, suspension of rules of evidence, "anti-terrorist" measures and, presumably in anticipation of popular resistance, since 1981 planning by emergency order for internment camps and censorship (Ratner and McMullan, 1983:39-40).

According to Ratner and McMullan (1983) in Canada, Britain and the United States an "exceptional state" incorporating an authoritarian consensus has emerged in which civil rights have taken a lowered priority in favour of control by a capitalist state bereft of some of its liberal democratic features (p. 34). Excluded from government spending reductions have been criminal justice expenditures which have risen as social welfare spending has declined (Chan and Ericson, 1985:229). As capitalism becomes increasingly caught up in its structural contradictions criminal law is pushed to the forefront, in the hope that public attention will be deflected away from economic failures to "law and order" issues (Chan and Ericson, 1985: 229; Hall et al., 1978:29; Quinney, 1973:61).

Competition Law and the Regulatory Function

There are few indications that the economic crisis has fostered a stronger combines law enforcement policy. In Canada the Combines Investigation Act finally passed into history with the passage of the Competition Act on June 17, 1986, a feature of which is the transfer of the merger/ monopoly provisions (now "abuse of dominant position") from criminal to civil law. Conspiracy offences remain under criminal jurisdiction and the maximum penalty has been raised from $1 million under the old Act to $10 million (Canadian Competition Policy Record, June 1986:15).

In accordance with past anti-combines legislation the new law was formulated in close consultation with the corporate lobby whose intransigence delayed the revision for 20 years, since it was first proposed by the Pearson Liberal government in 1966 (Goff and Reasons, 1978:72).

Government publications freely admit the influence of the corporate lobby in the drafting of the new law.

> "The submissions that were made to the House of Commons Committee were fewer in number and more moderate in tone than was the case with earlier competition law reform bills that reached the stage of reference to a committee. That undoubtedly reflects the consultative process prior to the Bill's introduction. Changes called for by business groups included use of the test in mergers of "no substantial competition remaining", a Cabinet override for mergers, and a broader exemption for joint ventures" (Canadian Competition Policy Record, June 1986:16).

The extent of business participation in the writing of their own regulations was a focus of concern for the parliamentary opposition.

> "Both opposition parties contended that reliance upon consultations with business groups during the drafting of the bill had been excessive and that consultations with consumer and other interests had been inadequate" (p. 17).

At this time there seems little reason for optimism that the new Act will be any more threatening to corporate interests than previous enactments. Business has ensured that the burden of proof will be onerous, whether under civil or criminal law. In continuity with tradition the language is opaque; it is not clear, for example, what "effective competition" is or what it means to "substantially or completely control the relevant market". As in the previous act it is not enough even to show competition is substantially reduced; it must be shown that it was the corporate intent to so lessen competition. It appears that the corporate elite has once again illustrated its capacity to shape regulatory law in accordance with its interests. Corporate Canada can expect to continue to enjoy "systematic immunity from legal prosecution" (Ratner, 1986:27). It remains for the "new criminology" to adequately account for the pattern of lax enforcement of regulatory laws in capitalist economies, and for this an explanation of the state's role is essential. "Free enterprise" necessitates a policy of vigorous state intervention (Taylor, 1985:328), but in Canada this has occurred in the context of the state's accumulation role which has always taken precedence over that of legitimation (Stevenson, 1977:88).

The "new criminology"'s understanding of weak regulatory enforcement, in the absence of a comprehensive analysis of the state, continues to be formulated primarily at the instrumental level.

> "The source of leniency towards corporate malfeasance can be illuminated by recognizing the close ties between big business and official policy-makers. Because of their overlapping constituencies, negative sanctioning becomes tokenistic, a tendency complemented by the public's incapacity to perceive corporate crime as "real" crimes[18] and as threats to personal welfare. Moreover, the license to override laws is virtually built into the organizational systems of corporate enterprise, which compel and encourage crime both by corporate executives and by those outsiders who are also motivated by the credo of gain" (Ratner, 1986:27).

It is this systemic necessity to pursue profit that new criminologists and other critics point to as a criminogenic characteristic of some portion of production (Barnett, 1981; Gorring 1978:98). For Henry (1982:79) the paramount objective of capitalist production is maximization of profit as efficiently as possible, and this structural imperative results in decisions detrimental to the health and safety of workers and to the public interest.

Legal constraints impose additional economic costs disproportionately on the competitive sector, enhancing the state's legitimacy as economic regulator while diverting public attention from the more serious offences of large corporations (p. 186).[19] Regulatory laws are enforced by specialized agencies with budgets and staff inadequate for the tasks they ostensibly serve (Cotterrell, 1984:278; Doern, 1979:176).[20] Concerned with justifying their own existence, agencies are typically preoccupied with observable results and so target their limited resources on "winnable" cases. Large corporations therefore have every incentive to break regulatory laws, aware that the prospective legal consequences are negligible in comparison to potential illicit economic gain (Barnett, 1981:5; Chambliss and Seidman, 1971:65). As Weber remarked: "The inclination to forgo economic opportunity simply in order to act legally is obviously slight" (Hunt, 1978:121).

Regulatory agencies generally pursue a policy of non-enforcement, seeking compliance from corporate "clients" instead (Box, 1983:58; Ermann and Lundman, 1978:62; Goff and Reasons, 1978:109-110; Gorecki and Stanbury, 1979: 174-178).[21] There are a number of predetermined reasons for this attitude. Given their limited resources agencies must employ negotiation and a broad use of discretion (Yeager and Clinard, 1979:68). Many regulatory authorities depend on industry for their data (Conklin, 1977:123).

Regulators must also contend with equivocal laws (Simon and Eitzen, 1982:53; Sutton and Wild, 1978:180) and lenient penalties, usually a corporate fine absorbed as a cost of business (Clinard et al., 1979:xxiii; Conklin, 1977: 101; Goff and Reasons, 1978:123).

In Canada there have been, outside of combines law, notable failures of the regulatory process in recent years, such as the collapse of two Alberta banks in September, 1985. By 1983 both banks were close to financial collapse as a result of imprudent lending and generally "bizarre banking practices" (Maclean's, November 3, 1986:41). The banks' auditors, "members of four of Canada's largest and most respected accounting firms" (p. 41), condoned the banks' imaginative accounting practices which concealed their precarious financial status from shareholders, depositors, the federal and provincial governments and the public. The Office of the Inspector General of Banks was revealed as a "regulatory watchdog without bark or bite" (p. 41).[22] The Inspector General was aware or should have been aware of the true state of the banks' books but did not act. On the basis of his report the Governor of the Bank of Canada recommended a financial "bail out" when the banks' troubles became public early in 1985. The most serious aspect of the whole matter was not the bad management of the banks, but the fact that "when the regulatory system was needed, it failed and it failed spectacularly" (Globe and Mail, October 25, 1986:D6).[23] Regulatory failures have been documented elsewhere in the Canadian financial sector, notably the insurance industry (Fleming, 1986:315-339) and trust companies (Best and Shortell, 1985:263-331).

The reality is that corporate capital solicits its own regulation by the state, much preferring it to competition (Clement, 1977:237; Humphries and Greenberg, 1981:232; Pearce, 1976:84). Even those who resist it initially, the Director of Investigation and Research for combines matters testified to the Royal Commission on Corporate Concentration (1978:400), "frequently learn very quickly to prefer the comfort of a regulated environment, to the cold winds and rough blows of competition".

Clinard and Quinney (1973:207) argue that American capitalism was "secured, rather than threatened" by the Sherman Antitrust Act of 1890, that its chief aim and that of subsequent legislation was the protection of business. The "Progressive Era" that followed (1900-1916) saw the "triumph of big business" as more regulatory laws came into force reflecting corporate "solutions" to the problems of industrial organization (pp. 207-208).

Bliss (1973:44) regards Canada's first anti-combines law, passed one year before the Sherman Act, as tantamount to a confidence trick in that the original drafts were diluted until unenforceable and only passed to deflect public attention from a policy of high tarrifs (pp. 44-45). Corporate concentration in Canada was able to move ahead at a rapid pace, oblivious to such laws and with the blessing of the state (Clement, 1977:237).[24]

Richards and Pratt (1979:54-61) have shown how imperative regulation of oil and gas production was for the orderly (if rapid) development of the industry in Alberta. Regulation at different times and for different reasons benefited large and small players alike, but the biggest gainer was Imperial Oil, the largest company, powerful enough to refuse to comply with regulations which conflicted with its interests. On such occasions the provincial government declined to enforce the law (p. 57). The real purpose of the regulations was to stabilize the industry, reconcile factions and to reduce wastage, not to protect the consumer. The Oil and Gas Conservation Board set up in 1938 was unable to enforce the law against the wishes of the regulated.

> "In general, one can conclude that, wittingly or otherwise, regulatory agencies charged with administration of market prorationing schemes have been successfully used by the major oil companies as instruments to realize their target rates of return and to perpetuate their dominant market shares" (p. 60).

No anti-combines law has been passed without consultation with the private sector, a corporate prerogative constituting "the most important kind of power" (Snider, 1980:358). Another exhibition of corporate muscle has been seen in the government's amendment of the pharmaceutical Patent Act which eliminates new competition from the manufacturers of "generic", less expensive copies of brand name drugs. The amendment is the fruit of 17 years of sustained lobbying of Ottawa by the United States government and its client, the multinationals' Pharmaceutical Manufacturers' Association of Canada, the target of which was the 1969 law permitting generic manufacture in return for a four per cent royalty to multinational patent holders (Globe and Mail, December 9, 1986:A1).

History shows that many "watchdog" agencies, even if they start out with the best of regulatory intentions, become coopted by and subservient to the industries they putatively monitor in the public interest (Chambliss and Seidman, 1982:107; Snider, 1980:365), or at least in time develop "accommodative relations" (Ermann and Lundman, 1978: 62). Clinard and Quinney (1973:221) assert that criminal law has failed as a regulatory instrument because large corporations "exercise political control and influence over regulatory agencies and the courts". John Turner, when Minister of Consumer and Corporate Affairs, remarked apropos:

> "I've looked at a lot of regulatory agencies, and the longer I'm around here, the more I believe that every one of these tends in a period of time to reflect the interests of the industry it is supposed to be regulating" (Clement, 1977:237).[25]

Many reasons serve to account for the dominance of corporate capital over their "watchdogs". Regulatory authorities are invariably under-financed and under-staffed so that medium sized corporations can outspend their regulators in the courts, and taking on the corporate elite entails the risk of prolonged, budget-sapping litigation, possibly all the way to the highest courts (Cotterrell, 1984: 283). There has therefore been an understandable reluctance in Canada to take on dominant market players (Goff and Reasons, 1978:79; Snider, 1980:358), a pattern Box (1983:74) has found applicable to Britain also. Another reason may lie in a lack of public awareness and support for the task of economic regulation. Agencies are often launched at a time when public feeling is at a high point on the issue of price levels, product quality or lack of competition generally, but with the passage of time there is a likelihood that public attention will abate once "something has been done". With loss of public interest there is a danger of bureaucratic ossification, and political support may be lost with an adverse effect on funding.[26] Corporate groups by comparison are well organized and committed to fighting for what they see as their vital interests (Bernstein, 1955: 79).

Many employed in regulatory agencies were previously employed or are subsequently hired by the economic sectors they are interfacing with as regulators, a consideration which is likely to temper enforcement with caution (Conklin, 1977:123; Harris, 1973:34).[27] At the field level inspectors are subject to pressures ranging from corporate payment of travel and hotel expenses to gifts and outright bribes (Conklin, 1977:123, 127; Globe and Mail, February 6, 1987: A1, A2).

Conclusion

The recognition of the centrality of the state in any sociological explanation of crime and especially that of the economically powerful, is an important advance on the part of the "new criminology" paradigm over that of mainstream criminology, which has not recognized a need to address corporate crime or to problematize the role of the state.

The discussion in the final section of this chapter provides useful insights into the complex question of the nature and professed goals of state regulation in advanced capitalist systems and its net accomplishments. While the "new criminology" has appreciated the indispensability of the state and law to a discussion of corporate illegality and has given a central place to them within the paradigm, it has done so only superficially. The state is portrayed in largely instrumental and authoritarian terms and clearly at the present time this does not do justice to the subject matter.

Reasons (1982) has drawn attention to these deficiencies and looks to the "new criminology" paradigm to provide the basis for a more rigorous sociological explication of corporate law breaking and regulatory responses.

> "The development of a critical, radical, and Marxist criminology within the last decade ... has brought attention to the sociology of law and the state as significant in understanding crime generally, and crimes by the powerful specifically ... A truly sociological study of crimes of the powerful necessitates an understanding of the broader sociopolitical context within which it occurs" (pp. 168-169).

The task of constructing a sociological account of the capitalist state requires that we look beyond the bounds of criminological theory for a sophisticated and in-depth analysis. It is an objective of this study to make some contribution to a theorization of the Canadian state in its regulatory function and in order to do so all theoretical models must be given equal consideration and be brought to bear empirically on a pattern of enforcement activity.

A number of questions serve as guidelines for the inquiry. Traves (1979:12) in his study of state-business relations in the period 1917 to 1931 raises some issues relevant to this study.

> "For example, is the state in a capitalist society the tool of the capitalist class? How are competitive corporate interests reconciled with borader class interests? How does the state promote social cohesion between competitive classes? What role do regulatory agencies play in this process? And, finally, how are these functions reflected in the structure of the state itself?"

More specific to this study: are corporations accountable to the state for acts (which appear to violate combines law) that are taken in defence of substantive interests? Why does Canada have such laws, particulary those dealing with merger and monopoly, and how have they been enforced? Why has the body of anti-combines law been enforced so poorly and why has the law continued in existence notwithstanding?

As a first step to addressing such matters the contemporary debate on the nature and role of the advanced capitalist state and law will now be examined.

FOOTNOTES

1 In his review of Sutherland's book Emerson (1950:583) pointed out that corporations were actually "gigantic, rambling enterprises" subject to hundreds of statutes and thousands of administrative regulations, making it inevitable that they would conflict with legal requirements on a fairly regular basis. Hopkins (1980: 200) makes the point that it is invalid to speak of recidivism when qualitatively different offences such as price fixing and pollution are committed by different departments of large corporations.

2 Klockars (1977:234-235) concedes that criminologists have always been willing to accept data other than criminal court convictions for research purposes, such as "offences known to the police".

3 Geis (1982:182) has argued for the retention of "white-collar crime" in preference to such alternatives as "business crime" (Conklin, 1977) "economic crime" (Edelhertz, 1978) and "occupational" crime (Quinney, 1963/77). A preliminary task to solving the definitional conundrum is seen to be development of a satisfactory taxonomy of white-collar crime, criteria for which might be: (1) existing law, (2) types of harm, (3) traits of offenders, especially occupational status, (4) modus operandi, (5) types of victim.

4 Occasionally corporate offences present opportunities for personal gain. The chief financial officer of the Firestone Tire and Rubber Company was entrusted in the 1970's with a $1.1 million political "slush" fund. He used most of the money to buy securities and to pay his debts (Clinard and Yeager, 1980:19).

5 In discussing corporate crime here the argument is confined to violations of extant criminal, civil and regulatory law in the interests of clarity, and in accordance with the perspective of critical criminology as defined by Pelfrey (1980:73-87).

6 Geis (1974:285) acknowledges that the nature of white-collar crime "does not readily lend itself to statistical analysis and hard-data reports". While quantitative research would be desirable, in its present undeveloped state white-collar crime calls for accumulation of case studies and hypothesis testing with a view to incremental theoretical advancement.

7 Geis (1982:178) has noted the tendency for academe to become attentive to the illegal behaviour of the economically powerful only after it has become a public issue.

8 **Whenever possible coding for seriousness was done in accordance with the criteria employed by each agency on a case by case basis. If this was not obtainable general guidelines were sought from each regulatory body. Where no information could be obtained specific criteria were formulated by the research project personnel based on general guidelines laid down by the project director. A three-level code was instituted by which offences were designated as serious, moderate or minor. Each ruling was made after discussions involving at least two of the five research members.** In making rulings some of the criteria considered were: repetition of the same offence, knowledge that the corporate act was illegal, extent of offence (whether company-wide or confined to some facilities), large monetary losses, unsafe products manufactured in large quantities and reaching consumers, length of time during which offences were committed (Clinard et al., 1979: 73-77).

9 This is not to suggest that the capitalist state controls economic production in the sense of decreeing the content and levels of output. The capitalist state presides over the capital accumulation process from a position of relative autonomy while attempting variously to steer production in directions congruent with state policy.

10 Recently the chairman of the Bank of Montreal spoke his mind about the pace of corporate takeovers in Canada: "Who has put up a new factory, brought in a new mine, put up a new pulp mill in the past five or ten years? I can count them on my fingers. It's sick ... People are finding it's cheaper making money with money than to make better goods or new products, or bring in new resources" (Maclean's, December 15, 1986:36).

11 The slave trade was itself a major source of industrial capital for those engaged in shipping, agriculture and cotton manufacturing (Krisberg, 1975:39-40; Williams: 1944).

12 The descendants of the "Robber Barons" appear for the most part to have no difficulty in reconciling themselves with the criminogenic origins of dynastic wealth. An exception was the American diplomat and former governor of New York, Averell Harriman who, one generation later, was "still sensitive about his father, as Nelson Rockefeller was not about his grandfather ..." (Halberstam, 1972:237).

13 Ratner and McMullan (1983:33) attribute the lack of class *polarization to Canada's "balkanized" political system,* a consequence of which is a regionalizing of most issues. Right-wing populism in Canada has been fractured by geography and dual culturalism (p. 40).

14 **The Law Reform Commission in 1976 commented: "Canada ... is one of the harshest Western countries when it comes to use of prison sentences. Many of the terms imposed are far too long, half of the people in prison should never be there, and so many are in gaol that those few needing real care and attention cannot get it. Indeed the whole system resembles a vast machine sucking people in one end, spewing them out the other and then sucking them back in again - a self-generating mechanism, certainly not a human process" (Law Reform Commission, 1976a:11-12).**

15 Police strength rose from 28,000 in 1962 to 52,000 in 1977 in Canada, an increase in the ratio per 1,000 citizens of 1.5 to 2.3. If civilian employees are included the ratio for 1977 becomes 2.8 (Taylor, 1983: 27). Spending on police, courts and corrections rose from $100 million in the early 1960's to $1 billion in the late 1970's and was projected by the Solicitor-General's department at $7.5 billion for 1985-1986 (p. 141). In prisons and jails the staff-inmate ratio rose from 1:2 in 1966 to 1:1.2 in 1979 (p. 142).

All this has to be placed within the context of an overall increase in crime in this period, especially interpersonal crimes of violence (murder, manslaughter, attempted murder, wounding, robbery and rape), the rate of which almost doubled between 1969 and 1979 (p. 27). A "generalized popular fear of crime" in Canada, therefore, does seem to have "a rational basis in the overall rates of crime known to the police throughout the country" (p. 3).

16 Health and welfare spending in Canada rose from 17.8 per cent of overall spending in 1954 to 41.4 per cent in 1973. Public spending as a whole was 39.1 per cent of gross national product in 1974 (Taylor, 1983:137, 121). Because of the progressive decentralization of political power since 1945 most of the increase in government spending in the period 1955-1974 has been by the provinces. Monies received from Ottawa constituted almost one-quarter of federal spending in 1974 compared to one-tenth in 1955. Provincial government spending rose from 6.4 per cent of gross national product in 1955 to 16 per cent in 1974. Provinces and municipalities together spend more than the federal government (Stevenson, 1977:80). Provincial government bureaucracies grew faster than that of the federal system as indicated by a hiring rate three times greater for the period 1963 to 1972 (Olsen, 1980:12).

17 In fact Canada has a "dual welfare system" (Taylor, 1983: 15), the chief beneficiaries of which are corporations, whose subsidy tends to increase in times of economic recession (Lewis, 1972:2). In addition the corporate share of income tax has steadily been reduced until by

1984 it constituted only 24 per cent of tax revenue received by government (Globe and Mail, March 30, 1984: 11). Shell Canada, for example, paid no tax whatsoever between 1964 and 1969 while earning $516,517,000 (Lewis, 1972:11).

18 The Law Reform Commission in its consideration of regulatory law in 1976 also clearly distinguished between "real crime" and regulatory offences, the latter being merely acts prohibited for convenience and not violations of fundamental values. "Once treat the regulatory sector as seriously as the Criminal Code, and we may end up thinking real crime no more important than mere regulatory offences" (Law Reform Commission, 1976a:11). While recognizing "we still have one law for the rich and another for the poor" (p. 12), that the poor were disproportionately criminally prosecuted and too many were incarcerated, the Commission recommended prison sentences be entirely removed from the regulatory area since such offences were primarily ones of negligence, such as failure to comply with safety standards. To qualify as a regulatory offence at all the corporate act should be potentially harmful, whose prohibition does not challenge basic values and achieves more harm than good.

Much of course depends on what one's definition of "harmful" is; the Commission (like the courts) focuses on the question of demonstrable criminal intent, always a problematic issue in corporate criminal proceedings, and ignores the actual physical consequences of such actions as violation of (minimal) state safety regulations. For the Commission, as for most lawyers, crime is what is contained in the Criminal Code at any time and almost entirely involves person-to-person wrongdoing. Small wonder, then, that businessmen have no difficulty in perceiving themselves as decent citizens "engaged in socially useful pursuits" who inadvertently fall foul of the law, or that they have succeeded in limiting the kinds of controls they are subject to (Cotterrell, 1984:286, 274).

19 The cost of monopoly and oligopoly in terms of lost production in Canada has been calculated at between $4.5 billion and $6 billion annually (Goff and Reasons, 1978:106). Monopoly power fosters inefficiency and poor resource allocation, permits overcharging for goods, removes jobs, hurts small investors, taxes the poor to socialize the capital costs of the corporate rich, weakens Canada as a trading nation and "ultimately threatens our democratic process" (Francis, 1986:1), yet in Canada concentration of corporate ownership has been fostered by state policy (Young, 1974:77).

20 Goff and Reasons (1978:110, 112-113) note that the Government Travel Bureau spent five times as much in 1972 than did Combines Branch of the Department of Consumer and Corporate Affairs. About 60 times as much was spent by the RCMP law enforcement program. Increases in resources for Combines Branch have not kept pace with the expansion of economic activity in Canada. In the United States in the late 1970's the federal government employed 10,000 lawyers, yet all white-collar and corporate crime was handled by less than 200 assistant Attorneys in the fraud section of the Justice Department (Clinard et al., 1979:35).

21 Following defeat in Canadian courts in 1960 in the Canadian Breweries and British Columbia Sugar Refining cases (see chapter 6) the Director of Investigation and Research for combines matters began a practice of consultations with corporations in which he received notice of proposed business initiatives and offered advice as to their legal status under the Combines Investigation Act. This became known as the Program of Compliance and rapidly "became formalized and used as a major element of antitrust enforcement in Canada" (Gorecki and Stanbury, 1979:175). In the year ending March 31, 1985, 98 "informal discussions" were held by the Director's staff with business groups (Annual Report, Director of Investigation and Research, 1984-85: 7). In effect business receives free legal advice on how to circumvent the law.

22 In the final analysis regulatory authorities may be defeated by technological wizardry. The chairman of the Bank of Montreal, referring to the Alberta banks failure, has commented: "With electronic technology money can be moved through Winnipeg, Toronto, New York, Miami, the Caymen Islands, the Bahamas and into Switzerland, all in one day, and I defy anyone to track that. The best thing to do is to create a structure in which no one has to depend on the cops to catch the robbers" (Maclean's, November 25, 1985:49).

23 Even when there is evidence of corporate fiscal fraud securities regulators have dragged their feet. The Alberta Securities Commission (ASC) declined to prosecute officers of Dial Mortgage following its bankruptcy in 1981, for the issuance of misleading financial statements (Edmonton Journal, January 31, 1984:A1). There was also evidence of political interference by the Alberta Government with the regulatory process (Edmonton Journal, January 26, 1984:A6). In 1984 the ASC stayed charges against Abacus Cities Limited after a five-year investigation (Maclean's, July 30, 1984:32). In Ontario the Ontario Securities Commission (OSC) refused to take legal action against financier Conrad Black for violations

of regulations concerning notification of stock purchases, despite pleas from the Attorney-General of Ontario, Toronto police and the OSC's own investigators that the case be prosecuted. Indications of political interference at the provincial level were also suggested by this case (Maclean's, April 25, 1983:30-38).

24 The state-corporate alliance in advanced capitalist societies periodically precipitates state intervention of a blatantly political character. In 1949 the St. Laurent Liberal government provoked a political crisis in refusing to prosecute the flour milling industry for price fixing, despite evidence going back to at least 1936 (Rosenbluth and Thorburn, 1963:10-16). In the United States President Nixon personally intervened to halt a major antitrust prosecution of ITT (Clinard et al., 1979:9). This is only the best known instance in the United States of a series of such political obstructions of regulatory enforcement since the 1950's (Clinard and Yeager, 1980:144). On occasion democratic governments can also be relied upon by corporate interests to override court rulings, as Hundloe (1978:142) has shown for environmental issues in Australia.

25 Close relations with clientele, to the extent that regulatory proposals are tailored to what it is thought business will accept, invites the possibility of "capture" of the regulatory authority by the regulated, a circumstance noted by the Royal Commission on Corporate Concentration (1978:399). The possibility exists both for independent bodies and departments of government; because of limited budgets amicable relations must be established with industries or regulation is impracticable (Doern, 1979:175). Enforcement strategies always take account of economic power (Cotterrell, 1984:287). Indeed the regulatory function is itself testament to the success of corporate capital in restricting the types of state control it is subject to (p. 274).

There is a lack of Canadian empirical data as to which authorities are captured (Doern, 1974:32) but the structure of the regulatory process in Canada, wide and equivocal mandates, multi-functionality, cabinet intervention, administrative dependence on other federal and provincial government departments and the inclusion of state owned enterprises as part of the clientele:

"... all suggest that Canada's major regulatory agencies are more accurately viewed as being intended to perform more of a managerial function over their policy field (along with other important departments of government) rather than being strictly regulatory policemen ... Hence, if capitivity exists it is more of a government or state captivity, rather than a clientele captivity as such. Moreover, if countervailing quasi-pluralist constituencies are evolving, or are to be created, they are more likely in the Canadian context to be found in the combined form of increasing provincial government interventions and emerging and increasingly permanent public interest groups, many of which are funded by the state through other government departments whose mandates themselves partly countervail those of the regulatory agency" (Doern, 1979:183).

In the final analysis it is simplistic to categorize agencies as "independent" or "captive" because regulatory organizations are multifunctional and are more likely to oscilate along continuums of "independence-dependence" and "politicized-depoliticized" (Doern, 1974:26).

26 Bernstein (1955:74-102), writing of the American regulatory system, has postulated that agencies manifest a "natural life cycle" carrying them through progressive phases of "gestation, youth, maturity and old age" (p. 74). By the time maturity is reached the regulatory authority has become part of the status quo, an essential feature of the industrial topography, and is preoccupied with its own bureaucratic goals, chiefly survival. It has moved from the role of policeman to that of manager, whose views increasingly agree with those of the industry. "There is a desire to avoid conflicts and to enjoy good relations with the regulated groups" (p. 88). The period of maturity ends with "surrender to the regulated" (p. 90). At all times regulatory personnel are aware of employment opportunities in the regulated industry; indeed, with declining prestige the agency may come to depend on corporate clients for staffing purposes (p. 93).

27 Harris (1973:34) notes that in the United States: "All but one member of the Interstate Commerce Commission who left in the 1960's went to work for the transportation industry". Small wonder, when the personnel overlap extends up to cabinet level. The same pattern has been found for Canada (Royal Commission on Corporate Concentration, 1978:399). Brown-John (1981:201-202) cites instances of regulatory personnel being drawn from the corresponding regulated industries.

In Canada the same two-way personnel traffic can be observed. The first head of the Foreign Investment Review Board was James Murray, managing director of the Hudson's Bay Company, vice-chairman of the

(American owned) Hudson's Bay Gas and Oil Company and a director of Royal Trust, Air Canada and Time (Canada), all of which were jettisoned that he might become Canada's "watchdog" on foreign invesment. With appointments such as this it is understandable that by mid-1976 the Board had approved 84 per cent of applications for foreign takeovers of Canadian businesses and had approved 94 per cent of proposals for new foreign business. Other instances of the private sector seconding its "star" players for state service are the appointment of Jean-Luc Pepin as head of the Anti-Inflation Board and the composition of the Royal Commission on Corporate Concentration (Clement, 1977:238-240). Clement (1975:346) notes "there has been an increasing interpenetration between the corporate elite and both the state and political systems in the last twenty years". He identifies 52 members of the economic elite on the boards of crown corporations, 24 on royal commissions and 78 on sundry other boards and commissions.

Career continuity is also to be seen in Canada between state owned industries and their regulators, for example, atomic energy and its control board (Doern, 1979:184).

The Royal Commission on Corporate Concentration (1978: 399) noted a "tendency for individuals on staffs of regulating agencies to move on to employment with the regulated firms" and that such persons "may accept employment with commissions in just such anticipation", factors conducive to "capture" of commissions.

II. THE NEW CRIMINOLOGY, THE STATE AND LAW

Introduction

The link between the "new criminology" and its pronouncements on corporate crime and the regulatory mechanism is a theory of law and the state. The study of any law "presupposes questions of State, ideology and the class struggle" (Beirne, 1978:474). In this chapter the "new criminology" paradigm is differentiated according to axiomatic and methodological differences, and the "critical criminology" component is identified as being of most heuristic value in a study of combines law violation and regulatory patterns of enforcement. To rectify the paradigm's unsophisticated treatment of the state competing theoretical models of the state and law are discussed.

After examining the chief characteristics of the liberal state model, the components of an adequate Marxian theory of the capitalist state are considered. Competing Marxian variants are evaluated in the context of the "instrumental-structural" debate, followed by subsequent contributions. Central to these analyses is the state regulatory function and policy problems arising from contradictions inherent in the dual accumulation-legitimation role.

Analysis of the state presupposes questions concerning the form, content and role of law and, in particular, regulatory law and its implications for capital. Law as ideology and the discrepancy between legal equality and substantive inequality are central to this discussion.

The "New Criminology"

In this section components of the "new criminology"[1] paradigm are identified according to ideological gradations and methodological differences. Pelfrey (1980:54) distinguishes three groupings within the paradigm, those of "conflict", "critical" and "radical" criminology.

Conflict criminology is epitomized by the work of Vold, Turk and the early work of Chambliss and Seidman (1971).[2] The concept of class is conspicuously absent from these analyses; conflict takes a pluralist form, occurring between interest groups, and law, while reflective of conflict outcomes, is presented as an expression of majority opinion (Pelfrey, 1980:63). In place of class dominance reference is obliquely made to "authority" with no attempt to locate conflict within macro-sociological power relationships or to allow for the fact that groups are unequally represented within the state structure (Mahon, 1977; Michalowski, 1981: 43). Instead the group "bargaining" process is analyzed from the standpoint of interactionism in which state forms are treated as unproblematic, a position owing more to Dahrendorf (1959) than Marx.

Critical criminology encompasses, in Pelfrey's typology, the work of Quinney (of the mid-to-late 1970's period), Krisberg, Taylor, Walton and Young among others.[3] Critical criminology introduces a Marxian critique to mainstream criminology which it sees as correctionalist

(Taylor, Walton and Young, 1973:281), although the "Marxism" often takes on an instrumental and deterministic flavour, as in much of Quinney's work (1974a, 1974b, 1977, 1980).

An important distinction between conflict and critical criminology is the latter's emphasis on class as the source of conflict in advanced capitalist societies and an emphasis on both theory and praxis[4] (Pelfrey, 1980:97). Another divisive issue is the definition of crime; conflict criminologists recognize that serious social harms perpetrated by the economically and politically powerful[5] are excluded by legalism from designation as criminal, but by no means reject the validity of the legal order taken as a whole (Friedrichs, 1980 : 39). Critical criminologists problematize the legal order and call for a critique of legal definitions of crime (Taylor, Walton and Young, 1975: 36, 46).

Radical criminologists advance the critique of traditional criminology and criminal justice further, adopting a more confrontational and uncompromising stance. Here "theory is almost totally disregarded, except as something to criticize, and radical methods are seen as optimuum" (Pelfrey, 1980:86).[6] Those who uphold the status quo constitute an "enemy" not to be refuted through critique but "destroyed" by praxis (p. 87). Radicals "live" the dialectical relationship between theory and practice, with action clearly paramount. Radicals are distinguished by their commitment to revolutionary politics, their rejection of the legal criteria of crime, by their methodology (historical materialism and the dialectic) and their critique of the epistemological universe of traditional criminology (Michalowski, 1981:44-47).

Only with the advent of the "new criminology" has the modern state and the law become integral components of the analytical framework. While the discussion of law and the state has too often been overly abstract, superficial and instrumental, credit should be given for the recognition that any examination of crime (and especially that of the economically powerful, given their close relations with the political elite) merits a political economy approach, accounting for the origin and nature of the state and law, the mode of production and the role of ideology in maintaining class hegemony (Ratner, 1985:13). This perspective sees the state, capital and criminal justice as interdependent with a comprehensive theory of the state as the integrating element (Ratner, 1986:28). That objective is a distant one at present, and requires an abandonment of the "abstract and general" treatment accorded the state (Greenberg, 1979: 112) characteristic of much of the work of the "new criminology" paradigm.

The approach to corporate crime adopted for this study approximates to the critical criminology perspective, since it encompasses a political economy focus. By contrast, the pluralist-conflict end of the "new criminology" spectrum has failed to address itself to the origin and role of the capitalist state (Michalowski, 1981:43). Critical criminologists retain a strong theoretical and empirical orientation, unlike radical criminologists who sublimate theory to praxis and, in the view of critics such as Turk (1977:218), have abandoned the principles of scientific research altogether. Critical criminology is, therefore, best equipped theoretically to contribute to a sociological account of corporate law breaking and the state regulatory response. Theoretical advancement will be contingent on a sustained empirical and theoretical focus in the areas of the state and law.

THE STATE

Preamble

Analysis of the Canadian state from both a liberal-pluralistic and a Marxian stance is at a rudimentary stage at present. An attempt will be made to outline the perspective of each theoretical model of the state with their implications for a combines regulatory policy.

The Liberal View of the State

The principles of Liberalism were first set down by Locke (1975) as spokesman for the rising English bourgeoisie in the late seventeenth century.[7] Liberalism "rests on beliefs about private productive property and the market economy ..." (Laxer, 1986:23), incorporating such values as equality, individualism, economic prosperity and personal freedom (Marchak, 1975:2). It assumes a competitive economy, the separation of the political from the economic, and equality of opportunity and freedom of choice in arranging one's affairs within the market place (Marchak, 1975:102; Urry, 1981:141). Social stability is achieved and maintained by a "balance" of social interests and a consensus with regard to fundamental social values (Clement, 1975:358).

In liberal democratic[8] societies socio-economic inequalities are institutionalized, yet liberal ideology portrays such societies as basically homogeneous in terms of wealth and power, in which only the greatest disparities are problematic. These and other "social problems" are matters for legislative reform, which need not require changes to the basic social structure. Social classes are irrelevant as explanatory phenomena since society is characterized by a plethora of social, political and economic interests, none of which are seen to be class-related (Dahl, 1976:354-360).

Liberal political theorists present liberal democracy as pluralistic, a system of "minorities rule" (Dahl, 1956: 128), in which minority interests check and balance one another's aspirations while government endeavours to placate all factions (pp. 137, 146) "for the general good" (Rose, 1967:485). In a system of "polyarchy" (Dahl, 1956: 133) there are no intransigent concentrations of power (Rose, 1967:493); political and economic elites are independent of one another "to a large extent" and merely "influence" one another "to some extent" (p. 493). In the last instance the political elite[9] is supreme (p. 492), the membership of which is constantly changing, thanks to the electoral mechanisms[10] which thereby "accord a good deal of power to the electorate ..." (p. 484). In this complex pluralistic system of checking and counterchecking the Chamber of Commerce is no more influential in matters of foreign policy than is organized labour (p. 488) and a volunteer campaign worker has more influence on "his" candidate than lobbyists (p. 491), instances of the liberal theorists' penchant for "equating the unequal" (Coleman, 1986:140). Even liberals concede that democratic "politics" amount to "superficial conflicts" in the face of overwhelming consensus about what constitutes legitimate political endeavour (Dahl, 1956:132).[11]

In the liberal conception all nation-states, including Canada, are "sovereign" (Marchak, 1975:102). The state is perceived as a neutral regulatory force for social peace, "independent" of the economic sphere and all particular interests. This would seem to premise an active interventionary state in defence of competitive capitalism, countering corporate concentration.

The liberal ideology has difficulty accounting for a good deal of empirical phenomena when specific social democracies are analysed. Liberalism must explain poverty amidst plenty, corporate concentration of ownership of the means of production, corporate intervention in political matters, the skewed distribution of private wealth typically found in liberal democracies, and the rapid growth of the state sector which has proceeded in step with the oligopolization of the economy (p. 10). The assumption that the state is neutral ignores the possibility that the state serves class interests, that elites have privileged access to the state apparatus and that a class bias is built into the structure of group representation itself (Clement, 1975:358-361; Mahon, 1977).

The perpetuation of the liberal ideology is closely tied to continuing economic growth, since ideology to be successful must be "lived" to some extent (Marchak, 1975: 115). A satisfactory economic performance yields its own legitimation (Offe, 1984:144-145).

The democracy of liberal democracies is of a formal, legalistic nature, and is of more recent origin than capitalism itself (Hutcheson, 1976:50; Laxer, 1986:23; Macpherson, 1965:6). By the time formal democratic rights were bestowed on the propertyless the capital-owning class no longer regarded such rights as a potential threat to their entrenched interests.

Macpherson (1965) and others have seen the mechanics of liberal democracy in terms analogous to that of the capitalist market place. Political parties, united in the defence of capitalism, compete for the people's trust by displaying their "platforms" replete with election "pledges". On the strength of campaign rhetoric and past governmental performance the electorate "buys" its next instalment of government (Macpherson, 1965:8; Marchak, 1979:54).[12]

The conditions necessary for the transformation of the liberal state into a liberal democratic one are given by

Urry (1981:140-148) as: the separation of the state from civil society and the economy; mobilized subordinate classes and social groups, especially the working-class, creating a reasonable balance of class forces. Other factors historically conducive to democratization of the liberal state have been conditions of war (for victors and losers), growing literacy, communications, urbanization and industrial concentration, particularly in the context of a defeated or schismatic ruling class or one undergoing a hegemonic crisis. The paramount factor, however, remains the presence of popular movements for social change.

As the liberal state became democratic it also became irreversibly a welfare state[13] (Keane, 1984:25; Offe, 1984: 152-153) and economic regulator[14] (Jessop, 1982: 171; Keane, 1984:12-13; Offe, 1984:35; Traves, 1979:166). The first two were concessions wrested from the dominant class by pressure "from below"; the regulatory role was necessitated by the dynamics of monopoly capital (Macpherson, 1965:11). The state for its part underwent rapid growth in step with it's increased social and economic responsibilities (Hearn, 1984:130; Marchak, 1975:62; Urry, 1981:153; Whitaker, 1977: 54), and with increased power came enhanced autonomy (Traves, 1979:155, 158).

It is this conspicuous state presence in the social and economic life of liberal democracies which for Marxists serves to:

> "... lay bare the inconsistency between the apparent legal and political equality of liberal democracy and the socio-economic inequality of a capitalism

> protected and maintained by the state" (Panitch, 1977:23).

As long as the demands of subordinate classes are addressed to some degree, liberal democracy and its objective of capital accumulation can continue. Disparities in wealth and life opprotunities are more easily accepted in times of rapid economic growth, while in recurring recessions the welfare apparatus stands ready to alleviate the harshest aspects of life under monopoly capitalism.

All the elements of the liberal state are found in the work of Dahrendorf (1959). The political and economic are "separate" spheres, power at one level not necessarily being reproduced at the other. Capital and labour have undergone "decomposition" under conditions of liberal democratic pluralism (pp. 41-51), removing conflict from the level of class to that of "quasi-groups" representing "manifest" and "latent" interests (pp. 237, 238) mediated by a disinterested state.[15] Conflict, while endemic, takes place on a sectoral, "interest group" basis congruent with the varied social roles of worker-citizens and institutionalized within the state apparatus.

Dahrendorf's perception concerning the "decomposition" of capital has been challenged. Dahrendorf maintains a clear separation of ownership and control has taken place in the corporate world since Marx's lifetime, and that control now rests with professional managers whose approach is "utterly different" (p. 42) from that of the classic owner-capitalist, to the extent that the profit motive is no longer invariably the paramount consideration.

In Dahrendorf's view:

> "Capital- and thereby capitalism- has dissolved and given way, in the economic sphere, to a plurality of partly agreed, partly competing, and partly simply different groups" (p. 47).

Such a statement ignores the oligopolization process that has taken place in the construction of monopoly capitalism. Countering Dahrendorf's view are Blackburn (1972) and Miliband (1969:28-37), who argue that, far from "isolating" ownership from corporate control, the manager is his mouthpiece, sharing the same objective of profit maximization, is often a major stockholder himself and even if not:

> "Those directors or managers who have no important share holding are still likely to be tied to their owners by their social aspirations and values, by a respect for the institutions of property and by a common social background" (Blackburn, 1972:167-168).

What appears to Dahrendorf as "decomposition" of capital is for Blackburn "a more effective means for its accumulation" (p. 175).

The Marxian Analysis of the Capitalist State

A difficulty in expounding a Marxian theory of the state is that Marx and Engels failed to find time for a coherent and comprehensive analysis (Jessop, 1982:1). A Marxian derived account of the twentieth century state, then, must be inferred from various obiter dicta in Marx and Engels' later pronouncements, which drew their inspiration primarily from the nineteenth century state formations of England, Prussia, Germany and France. It is by no means agreed by those advocating such theory-building that classical Marxism is adequate to the task of theorising the advanced capitalist state (Chorney and Hanson, 1980:81; Jessop, 1982:220).

Marx and Engels presented the state in several guises (Urry, 1981:80): (1) the state as parasitic, the private property of officials, (2) the state as a mystification, purportedly representing non-discriminate interests while in fact championing the interests of the ruling class, (3) the state as reflection of an economic base, (4) the state as an agglomeration of essentially repressive institutions (bureaucracy, military, police, judiciary, clergy) functioning as an instrument of class rule, (5) the state as a "public power" emerging at a certain stage of the social division of labour and separate from popular control (Jessop, 1982:21), a social regulator mediating class conflict and supressing the interests of subordinate classes in favour of the ruling class and the capitalist mode of production, (6) Engels portrayed the state as "ideal collective capitalist" juxtaposed with capitalism, a facilitator of accumulation.

Jessop (1977:353-354) outlines specific requirements for an adequate Marxian theory of the state under capitalism. Such a theory is one which: (1) is founded upon specific qualities of capitalism as a mode of production, (2) attributes a central role to class struggle in the accumulation process, (3) establishes relations between the political and economic "without reducing one to the other or treating them as totally independent and autonomous" (p. 353), (4) allows for historical and national differences in form and function of the state or capitalist societies, (5) allows for the influence of non-capitalist classes and "non-class forces" in determining the nature of the state and its use of power.

The construction of an adequate Marxist theory of the state in capitalist society necessitates certain caveats (Jessop, 1982:221-228).

(1) The theory represents an adequate Marxist account of "the state in capitalist societies" (p. 221) not "the capitalist state". No assumption should be made of the capitalist nature of the state. The presence of a capitalist mode of production does not imply the capitalist character of the state, for the state is premised upon (a) a definite social formation enveloping the mode of production, which includes non-class relations (most often, however, the state will be found to be the expression of specific historical forms of class rule: Hirsch, 1978:63), (b) an institutional definition of the state which does not presume unity by reason of predetermined essential "functions" and which perceives the state to be the source of political power for which classes, class fractions and interest groups compete. The state "is a set of institutions that cannot, qua institutional ensemble, exercise power" (Jessop, 1982:221). The state has no "essential" form or function (Urry, 1981:81), both of which must be

ascertained empirically (Gerstenberger, 1978:57-59; Hirsch, 1978:58, 66; Jessop, 1982:222-223). There is, then, no "general theory of the state" (Aucoin, 1979:5; Jessop, 1982:24-25; Urry, 1981:81). The "present-day state", as Marx pointed out in his "Critique of the Gotha Program", exists nowhere, only a multitude of capitalist states taking different developmental forms (Tucker, 1978:537) whose evolution cannot be predicted (Urry, 1981:83). "Essentialism" obscures political struggle within and between state apparatuses and obfuscates differences between democratic and non-democratic state formations (Jessop, 1982:223).

(2) The state is not a "neutral instrument" but a complex of institutional apparatuses offering differential access to specific interests who are only able to constitute themselves as political forces and to fulfil their objectives within the state apparatus (p. 224). The "political weight" of specific interests is a function of their organization and means of intervention via the state. Political forces do not exist independently of the state but "are shaped in part through its forms of representation,[16] its internal structure, and its forms of intervention" (p. 221).

> "Thus the state should be investigated as a system of political domination whose structure has a definite effect on class struggle through its role in determining the balance of forces and the forms of political action" (p. 224).

(3) State power should be seen as "a complex social relation" reflecting the changing balance of social forces in any conjuncture (p. 221), conditioning and conditioned

by them (p. 225). No unequivocal distinction can be drawn between "state" and "class power" while at the same time one is not reducible to the other (pp. 224-225). Differentiation among types of power should be made "in terms of their institutional mediation and/or their social bases (p. 225). State power should be examined as "a form-determined condensation of social forces in struggle" whose outcome is institutionally mediated and which must be explicated in terms of the specific state intervention[17] and its social bases. Power is always defined, not in zero-sum, but "conjunctural, relational terms" (p. 225).

(4) It should not be assumed that the state in a capitalist economic formation is "necessarily capitalist" (p. 226). Even in such circumstances state overtures are not "unequivocally and universally beneficial to capital" (p. 226). The state's phenomenal form evolves in class struggle and serves to reproduce that struggle; the state has no privileged knowledge as to what is the "best" option for capital and policy therefore may not be unambiguously beneficial to capital (Gerstenberger, 1978:57; Hirsch, 1978:65; Jessop, 1982:91; Offe, 1984:126; Urry, 1981:81-82). Conjuncturally the state's institutional form and mode of intervention affects its ability to provide the preconditions for accumulation while capital accumulation in turn conditions the state apparatus and delimits the effects of state intervention. Relative autonomy does not necessarily facilitate the state's role in support of capital; rather than indulging in a priori reasoning, the effects of relative

autonomy (where it is in fact the case) must be empirically arrived at (p. 227).

> "... state power is capitalist to the extent that it creates, maintains, or restores the conditions required for capital accumulation in a given situation and it is non-capitalist to the extent that these conditions are not realised" (p. 221).

The very existence of the state is premised upon certain conditions (Offe, 1984:120-121): (1) the state is partially excluded from the organization of material production (the state may itself be a producer), merely establishing general economic goals by means of policy, the attainment of which necessitates the cooperation of capital, (2) the state's power is directly dependent on sustained accumulation, the source of all fiscal resources, (3) every incumbent of state power is therefore supportive of political-legal conditions conducive to accumulation, a circumstance conditioned less by privileged access or conspiratorial alliances of elites than by structural imperatives. What makes the state a capitalist state is "the position occupied by the state in the capitalist mode of production" (Holloway and Picciotto, 1978:5).

> "... the institutional self-interest of the state in accumulation is conditioned by the fact that the state is denied the power to control the flow of those resources which are nevertheless indispensable for the exercise of state power. Although the agents of accumulation are not primarily interested in 'using' the power of the state, state actors must be interested - for the sake of their own power - in guaranteeing and safeguarding a 'healthy' accumulation process" (Offe, 1984:120).

(4) In liberal-democratic states the institutional form of state power is determined by the rules of democratic process

(while its material content is contingent upon accumulation).

Taking a different approach, Panitch (1977:6-9) sees as minimal theoretical requirements a clear distinction between those institutions which are included in the state structure and those excluded from it, a demonstration of state linkages to the dominant class and a clear expression of state functions in capitalist social systems.

Marxists, more than liberal thinkers, address themselves to the etiology of the state in capitalism.

> "If ... we ask, where the state comes from, the answer is that it is the product of a long and arduous struggle in which the class which occupies what is for the time the key positions in the process of production gets the upper hand over its rivals and fashions a state which will enforce that set of property relations which is in its own interest" (Sweezy, 1956:242).

The functions of the state in capitalist societies have been variously expressed. These functions change, of course, from one "stage" of capitalist development to another (primitive, laissez-faire, simple monopoly and state monopoly capitalism[18] (Jessop, 1982:50-51, 53-57). Under conditions of primitive accumulation the state is overtly supportive of the ascendant capitalist class. Once the process of accumulation (and proletarianization) is under way and capitalist relations of production are established the state changes its institutional form to one appropriate to the reproduction of class relations. For this purpose the state "formally withdraws from society and at the same time becomes the state of society as a whole" (Gerstenberger, 1978:156). Reproduction of class relations is achieved principally in the legal sphere where the state regulates commodity exchange in isolation from the level of exploitative productive relations.[19]

The state in the monopolistic stage is characterized by its direct involvement in the circuit of capital through the mechanisms of nationalization, taxation and credit (Jessop, 1982:55). The state acts as a factor of cohesion attempting to create a hegemonic bloc from a capitalist class inherently subject to schism (Offe, 1984:243; Poulantzas, 1973:44-56). The other side of the coin is to perpetuate the subordinate status of dominated classes (Altvater, 1978:42; Hirsch, 1978:64-65; Jessop, 1982:103; Sweezy, 1956:249). The state in monopoly capitalism is responsible for the provision of all material and legal preconditions for accumulation (Altvater, 1978:42; Gerstenberger, 1978:156; Hirsch, 1978:64), functions which individual capitals are unable or unwilling to perform for themselves, and for the protection of property in all its forms, particularly that of capital, by countering the crisis besetting accumulation by such means as counter-cyclical expenditure and incomes policy (Hirsch, 1978:88-89; Jessop, 1982:98). In order to account for more specific functions one must move to the level of analysis of the concrete historical development of particular capitalist societies (Hirsch, 1978:66).

"Instrumental" versus "Structural" Analyses

In the 1970's the Marxian debate on the nature and form of the state in capitalism centred on the question of whether the state was controlled by the capitalist class or whether broader, structural factors accounted for state actions.

For "instrumentalists" such as Domhoff (1978:18-21) and Miliband (1969:28-37) the presence of the dominant class in managerial roles within the state apparatus is of great significance and the key to understanding why the state consistently serves the long-term interests of capitalism. The capitalist class, by virtue of their control of the production process, are able to manipulate the state apparatus for their own political and economic gain. Even so, Miliband recognizes that a state under capitalism entirely devoid of ruling class participants would be structurally constrained by its presence in the production process from serving other than primarily ruling class interests (Gold, Lo and Wright, 1975:33). The ruling class historically has been able to leave the management of the state in the hands of other classes while retaining economic power, as always, under its own control.

The capitalist class remains a power within and outside the state while conflict is routinized by such ideological means as parliamentary politics, unions, schools, the media and organized religion. Such institutions for Miliband are situated outside the state apparatus.

In his later work Miliband (1977) shifts his emphasis slightly, incorporating a more structuralist tone, presumably in response to critiques of his earlier works.

While still citing personnel overlap between the state and corporate business and the extent of ownership and control of the economic process which continues to be held by the capitalist class, Miliband also points to the central location of the state in the production process. The state is locked into the rationale of production for profit, and is therefore structurally constrained to serve capitalism.

The state nonetheless retains a degree of manoeuvrability, enabling it in times of crises to implement policies anathema to the dominant class (Skocpol, 1980:166). The state therefore acts on behalf of but not at the behest of the capitalist class and retains relative autonomy from all classes, including the capitalist class. In Miliband's view liberal democracy will likely be succeeded by a form of "conservative authoritarianism", fascist in content if not in form, more able to meet the long-term planning needs of advanced capitalism.[20]

Miliband's contribution is seen by Gold, Lo and Wright (1975:34) as a sociology of the capitalist class. In combating liberalism he has been accused of arguing from a liberal epistemology, attributing too much value to the voluntaristic actions of groups and individuals, and not enough to objective structural constraints on the capitalist class (Gold, Lo and Wright, 1975:35; Poulantzas, 1972:245-247).

There is no indication of how the state's strategy is shaped by class conflict at the economic level or of the interdependence of the two. For Miliband, politics is an autonomous phenomenon rather than epiphenomenal (Jessop, 1977:357).

Poulantzas: The State as an "Ensemble of Structures"

> "A structuralist theory, ... systematically elaborates how state policy is determined by the contradictions and constraints of the capitalist system, while instrumental manipulation remains a secondary consideration" (Gold, Lo and Wright, 1975:31).

The relationship between the dominant class and the state is an objective one, structurally determined by the massive state presence as economic manager on behalf of that class. The presence of members of the ruling class in the state apparatus, then, is an effect of the relationship, not a cause. If state aims and ruling class interests coincide it is primarily because of inherent features of the mode of production itself, and less a matter of intentionality on the part of either state or ruling class personnel (Poulantzas, 1972:245).

For Poulantzas (1973:44) "the state has the particular function of constituting the factor of cohesion between the levels of a social formation". The state articulates each level and regulates the "global equilibrium" of the social formation. The state is "also the structure in which the contradictions of the various levels of a formation are condensed" (p. 45).

The state provides all the prerequisites for capital accumulation, including the unity of the social formation, comprising "a complex unity of instances" (p. 49), principally the political, economic and ideological, each of which enjoys autonomy within the formation. The state expresses politically all conflicts and interests and contains them, minimizing class conflict. In preserving the unity of the social formation (the class structure) the state serves the interests of the dominant class in that formation.

In doing so, the state preserves a "relative autonomy" from all social classes and fractions, including those of the power bloc. Poulantzas then stakes his ground with regard to this instrumentalist position:

> "By this usage, I hope clearly to mark the gap which separates this conception of the state from a simplistic and vulgarized conception which sees in the state the tool or instrument of the dominant class. Our task therefore is to grasp the specific functioning of the capitalist type of state relative to preceding types of state, and to show that the conception of the state in general as a simple tool or instrument of the dominant class, erroneous even in its generality, is particularly useless for grasping the functioning of the capitalist state" (p. 256).

The relative autonomy of the state in advanced capitalism is not a special condition attained in unusual circumstances (as when classes are in "equilibrium"), but a structural condition of late capitalist social formations, an objective relation between state and social formation. Relative autonomy remains the norm unless some fraction of the dominant class is able to gain control of the state apparatus for its own ends (Poulantzas, 1972:247).

The relative autonomy of the state in conditions of capitalism is only that degree of autonomy necessary for the political organization of the bourgeoisie by the state.

The social formation is preserved both by giving the bourgeoisie the political solidarity it is unable to provide for itself[21] and by ensuring ideologically subordinate classes never achieve that degree of political unity. In order to do this in the long-term interests of the bourgeoisie as a whole, the state must be able to distance itself from all elements of that class, including its core, the hegemonic fraction.

> "The state may, for example, present itself as the political guarantor of the interests of various classes and fractions of the power bloc against the interests of the hegemonic class or fraction, and it may sometimes play off those classes and fractions against the latter. But it does this in its function of political organizer of the hegemonic class or fraction and forces it to admit the sacrifices necessary for its hegemony" (Poulantzas, 1973:301).

Relations between the state and particular fractions of the bourgeoisie will sometimes be hostile because the state is able to coerce elements of the dominant class into accepting unwelcome policy initiatives. The state's "social function" is a case in point, necessitated by its legitimation role, yet even here the state is acting in the long-term interests of the dominant class, whether that class has the foresight to see it or not. State intervention "has always occupied an ambiguous position in ruling class ideology" (Chorney and Hanson, 1980:71). On the other hand, the bourgeoisie does not have to passively acquiesce; it has means of resistance (Skocpol, 1980:167-169).

Unlike Miliband, Poulantzas places the ideological apparatus within the state boundaries, centering it in the juridical process whose task it is to divorce the economic class struggle from its counterpart at the political level. The effect at the economic level is to atomize the working-class into discrete subjective beings, oblivious to the fact that their relations are class relations and that, while economic production is a cooperative endeavour incorporating all classes, the new wealth is expropriated by the class privileged to own the means of production. The fundamental contradiction of capitalist political economy (that production is socialized but new wealth is appropriated by owners of capital) is concealed by ideological means from the direct producers.

The state is therefore able to present itself as the "nation-state", the "strictly political, public unity of the particular, private, economic antagonisms of the ensemble of 'society'" (Poulantzas, 1973:276).

The state's legitimacy lies in a popular sovereignty derived from a social formation in which classes are denied and displaced in public consciousness by "an ensemble of citizens, of formally and abstractly free and equal individuals set up as political persons ..." (p. 277). The state can then confront all social classes as the embodiment of the "general interest".

Poulantzas' work has been faulted on a number of counts. While correctly emphasizing structural factors as the chief determinant of state action, he fails to indicate the actual social mechanisms that ensure the relative autonomy of the state (Gold, Lo and Wright, 1975:38; Jessop, 1977:358).

The structural emphasis is overly deterministic, giving the state a functionalist, self-perpetuating, immutable quality, making its overthrow seem unlikely under any circumstances. It appears "almost a logical impossibility for capitalist states to function in a manner which is not complementary to the dominant classes" (Frankel, 1982:258). Jessop (1982:191) detects a shift in Poulantzas' later work from a structural analysis to one focusing on class struggle.

In fact the state in monopoly capitalism has severe legitimation problems and is continuously pressed on all sides to sustain itself. A succession of legitimation crises indicate the problem has not been solved by the advent of the welfare state (Habermas, 1973; O'Connor, 1973; Offe, 1984:269; Wolfe, 1973:154-155). The state has become a permanent crisis manager and the crisis has consequently become a continuing crisis of the state (Frankel, 1982:258; Holloway and Picciotto, 1978:1).

A key characteristic of the state in conditions of monopoly capitalism according to Poulantzas, is the centralization of power, usually in the executive or legislative sectors of the state apparatus, whichever is "the dominant place where the hegemonic class or fraction is reflected" (Poulantzas, 1973:305). This, says Poulantzas, is accompanied by a "decline of local power" (p. 279). Much of what Poulantzas has to say about the contemporary capitalist state in industrialized countries is of a highly generalized and non-empirical nature. Presumably he has Western Europe in mind, for the centralization thesis is much less applicable to confederations such as Canada. This illustrates the need for empirical specificity in discussions of capitalist state structure.

The views presented by Miliband and Poulantzas do not constitute an "either-or" choice (Lukes, 1974:54) and their debate has served only to underline the need to transcend it (Holloway and Picciotto, 1978:3). Much of their disagreement is attributable to a difference of emphasis between the empiricist-voluntarist approach of Miliband and what has been seen as an "anti-humanist" and ahistorical theme in Poulantzas' structuralist approach (Bridges, 1974: 180). If the state is not reducible to interpersonal relations (Poulantzas, 1972:245-247), neither is it discernible by means of a "structural super-determinism" (Miliband, 1972:259). The former places too much emphasis on the voluntarism of ruling class actors, the latter too little (Gold, Lo and Wright, 1975:39). The Miliband-Poulantzas debate served to correct to some extent defects in the work of each, creating a "convergence" effect. Motivation and "objective relations" must both be accounted for in a Marxist theory of the state. Such a theory must be capable of discerning a major qualitative difference between social democratic and facist capitalist states. The parameters of the state apparatus must be agreed upon, along with the exact nature and function of the managerial elite.

The position taken here is that, with the exception of the judiciary, all other ideological institutions are located outside the state. The advent of the managerial elite has not qualitatively changed capitalism as a mode of production; it has served to perpetuate capitalism by making it more efficient. As ex officio controllers but not owner-controllers of capital, their role is confined to serving the interests of the capital owning class.

Miliband's empirical focus is a correct one; in discussing the monopoly capitalist state (or any form of state) the temporal and spatial context must be specified. Both Miliband and Poulantzas have been criticized for their "focus on political and ideological struggles without reference to economic imperatives and requirements of capital accumulation" (Jessop, 1977:357) and for contributing nothing towards a materialist analysis of the state (Holloway and Picciotto, 1978:3-4). Since class struggle is waged through the state and is shaped by state policy, Poulantzas' theory of the state needs to be contextualized in the class structure. Since he does not do so, Poulantzas is unable to show why the state's "objective function is to maintain class domination" (Bridges, 1974:171).

He asserts that state policy, subject to class pressures, is contradictory and ambiguous in the short-term, yet in the long-term and in the aggregate they correspond to the interests of the dominant class. "But how can this 'macroscopic necessity' emerge out of such 'microscopic diversity'?" (Jessop, 1982:183). Another contradiction is found in his insistence on economic determination "in the last instance" while treating the political as autonomous (p. 181). The state is credited with a rigorous organic unity, allowing him to assert the relative autonomy of the state apparatus as the sum of the relative autonomies of its institutional parts (pp. 184-185). Such a view has been rejected by the "state derivation" school.

> "The heterogeneous and increasingly chaotic structure of the bourgeois state apparatus is a precondition for its being able to maintain complex relations to the various classes and class fractions, relations which are the conditions of its ability to function as guarantor of the domination of the bourgeoisie. It must be open to the divergent interests and influences of individual capitals and groups of capitals, which always encounter one another in competition as 'hostile brothers', and in order to secure the political domination of the bourgeoisie and keep class conflict latent, it must maintain links both with the proletariat and with other classes and strata not to be counted as part of the bourgeoisie" (Hirsch, 1978:100).

From this perspective the state achieves internal unity only in its repressive control when it confronts the working-class, while necessarily disintegrating into bureaucratic fragments in its complex regulatory role in which some classes, class fractions and capitals are favoured over others in the long-term interests of capital as a whole (pp. 100-101).

The political domination of classes and fractions is only explicable in terms of the differential access to economic resources and this involves an analysis of the political economy of specific states. The very existence of the state, after all, is dependent on the capital accumulation process as a source of revenue and legitimation (Bridges, 1974:172; Hearn, 1984:130; Hirsch, 1978:66; Offe, 1975:126).

Transcending Instrumentalism and Structuralism

O'Connor (1973), and Offe (1972a; 1972b; 1975; 1984) have made contributions that move beyond the sterile instrumentalist-structuralist debate.

Empirically O'Connor (1973) has shown the dilemma faced by monopoly capitalist states in attempting to perform the contradictory functions of accumulation and legitimation. Both necessitate the channeling of revenues to the state; but since surplus value is privately expropriated, the state cannot be guaranteed sufficient revenue. In the economic downturn which has confronted international capital since the early 1970's, capitalist states have experienced declining revenues while pressured to increase expenditure for both social welfare and capital assistance purposes.

In Canada the "fiscal crisis" took the form of declining profitability, slow growth, a disinclination to invest and rising unemployment. Business since the mid-1970's pressured the state to reduce "social consumption" expenditures (such as unemployment insurance payments, health, education and welfare expenditures) and to assist the capital-intensive monopoly capital sector (Moscovitch and Drover, 1987:36-37). Funding of social programs was cut beginning in the 1970's, despite the fact that these expenditures were "not particularly high by postwar international standards ..." (p. 36). Although social consumption spending in Canada was 51 per cent of government expenditures in 1976 (Table 9, p. 34), Canada lagged behind Holland, Sweden, Denmark, Norway, West Germany, Belgium and

France in total government expenditures, despite having a higher per capita income than many of these countries (p. 37).

Instrumental and structural theories explain state activity in terms of external factors (ruling class manipulation and structural constraints). Offe (1972b; 1975) examines the mechanisms within the state which "guarantee its class character" (Gold, Lo and Wright, 1975:37).

In Offe's (1972b) view monopoly state capitalism's requirements have to such an extent become a matter of "technocratic administration" as to make the concept of "politically dominant classes, strata or groups functionally inoperative in a ruling capacity" (p. 73).

Since advanced capitalist systems are characterized by comprehensive social and economic state regulation, political authority, in Offe's view, can no longer be discussed in exclusively class terms. Yet dominant class interests continue to be protected in vaguely worded democratic constitutions and the political order remains fundamentally authoritarian.

Organization of political power takes place: (1) through "voluntary" political parties which appeal to the broadest interests and aspirations, (2) by defining certain areas of activity as "beyond state authority" allowing for their "undisturbed use by economic persons" (Offe, 1972b:79). Constitutionally limited state power and the institutionalized articulation of needs are rendered congruent with dominant class interests.

Consensus formation in late capitalist social democracies is accomplished "through disciplined mechanisms built into the institutions charged with the articulation of political needs" (p. 83). These institutions include political parties, unions and legislatures. In this context politics is denied its class content and is trivialized; the non-political is presented as crucially political while the fundamental political questions (such as ownership of the means of production, distribution of wealth and the nature of the class system) are treated as irrelevancies.

Operation of the state apparatus has thus become an administrative matter in which "the dominance of a few spheres of social function over others" (p. 95) is substituted for the domination of one class by another. Class motivation in the use of power becomes less helpful in understanding state strategy than does the identification of "fundamental system problems", of which Offe identifies economic stability, external threats and the maintenance of mass loyalty. These require "cautious crisis management and long-term avoidance strategy" (p. 99).

The priority of the Canadian state has been economic performance and only at the time of the depression of the 1930's could economic instability be said to have reached the level of systemic crisis. High levels of corporate concentration, far from being perceived as a likely symptom of economic malfunction, have been regarded by state elites as the surest means of sustaining high economic performance. The possibility of economic dysfunction from oligopolistic control necessitates the presence of a complex regulatory apparatus, including combines enforcement, wherein a basic policy of non-intervention against monopolies has always prevailed.

The welfare state "in no way represents a structural change of capitalistic society" (Offe, 1972a:481). It is a minimal diversion of resources, intended to remove the harshest conditions for subordinate classes and addresses only the more recent problems generated by industrialism. Institutional constraints "confound every effort of the welfare state to solve its internal difficulties" (p. 486). The bulk of economic resources must be devoted to accumulation and so corporations and wealthy individuals are the biggest recipients of state largesse. How much is so allocated is less a matter of political debate than of "technocratic calculus" (p. 485).

In Canada, for example, while $10.6 billion was spent on social services in 1978 (Moscovitch and Drover, 1987: Table 8, p. 32) in the previous year individuals received $25 billion in tax breaks and corporate business received another $7 billion. In 1979 $47 billion in personal income escaped taxes. Since tax breaks favour the rich most of the money saved went to the affluent (McQuaig, 1987:216, 221-222).

Modes of State Intervention

As capitalism advances from (in some instances) a laissez-faire stage, through simple monopoly capitalism into state monopoly capitalism, state intervention in support of capital becomes increasingly "normal", although the nature of the capitalist interests prioritized by the state changes. If in conditions of laissez-faire capitalism the state manages the affairs of all units of capital, under conditions of state monopoly capitalism "it is said to intervene on behalf of monopoly capital to the total (or near total) exclusion of other fractions of capital" (Jessop, 1982:33). Other social classes, including the petit-bourgeoisie, are exploited to that end but no particular fraction of capital, big or small, is immune from state intervention (p. 140). Nor can any assumption of functionality be made in this regard, given the contingency-laden nature of state intervention (p. 67).

Jessop (1982:233-238) adumbrates the differential nature of state intervention in the evolution of capitalism: (1) for those states which have known laissez-faire conditions intervention takes the minimal form of "formal facilitation", maintaining formally rational legal, administrative and monetary systems, otherwise permitting commodity exchange to be governed entirely by market forces. (2) To the extent the market is not able to sustain a level of exchange enabling most units of capital to function, the state will be compelled to reproduce some of the general conditions of production ("substantive facilitation") such as provision of labour power, infrastructure and energy supplies. (3) By means of "formal support" the state alters the general external conditions of production in specific ways and/or establishes legal, financial or administrative conditions favourable to particular capitals (for example, through changes in competition or company law). (4) More directly, "substantive support" involves the provision of specific conditions to specific capitals (such as licences, monopolies, state credit). These last three modes of intervention are associated with simple monopoly capitalism (p. 237). (5) By its prerogative of "direction" the state "overrides the formal freedom of economic agents and directs that they either act or refrain from acting in particular ways" (p. 234). This feature may take the form of direction "from above" or that of corporatism,[22] in which case the loss of autonomy for capital may not be so severe (Coleman, 1986:151-152). Direct intervention is most relevant to state monopoly capitalism.

The above is, of course, only a general model and allows for national and historical differences. Canada, for example, has had no laissez-faire "stage" in her development.

As the mode of intervention shifts with the development of capitalism from a competitive base to one of monopoly capital, so too does the form of the invigilating state, from that of liberalism in which a clear distinction is found between the political and economic sectors, through simple monopoly capitalism's departure from the "free market" and rule of law, and the growing substitution of corporatist forms of political representation for parliamentarism. The state reaches its fullest manifestation in state monopoly capitalism when it is itself an integrated "factor of production", abandoning rational-legal administration "in favour of ad hoc, selective, and discriminatory action oriented to specific economic objectives" (Jessop, 1982:239)

The object of state policy is most often seen from a Marxian perspective to be: (1) facilitation of capital accumulation (by such means as regulations and financial incentives to control "destructive" competition, infrastructural investment, incomes policy and corporatist decision making (Hirsch, 1978:88-89; Offe, 1984:125), (2) maintenance of social harmony, thereby legitimizing the socio-economic system as "democratic" and "just" (by such means as social welfare provision), failing which, (3) the state is prepared in the last instance to use coercion to achieve and maintain social order (Hearn, 1984: 125-126; Panitch, 1977:8). The use of coercion must be balanced against the loss of legitimation (Aucoin, 1979:21).

For accumulation to be sustained (the primary objective of policy) dispossessed labour power must be transformed into active wage labour, a process only possible by means of state policy in terms of requisite educational/job training, health care and ideological motivation to work. By the same token the state is in a position to determine who is and is not qualified to enter the wage-labour relation and otherwise reduce labour-power to the level of another economic "resource" (pp. 94-96).

State policy is only comprehensible as an attempt to reconcile the demands, needs and interests of social groups with what the state regards as the functional "needs" of capitalism in any conjuncture (pp. 103-104). One possible outcome of politically expressed demands upon state institutions is "the internal rationalization of the system of performance of social policy" (p. 104).

SOCIOLOGY OF LAW

Introduction

Theorization of the state in capitalism is inextricable from a consideration of the role of law in late capitalist systems. Indeed the debate concerning the nature and role of law in advanced capitalism and its social basis received an impetus from the late 1960's onward in the context of the "crisis of the state" (Hunt, 1982:76; Offe, 1984:35-39; Picciotto, 1979:164). Heretofore a social engineering perspective had prevailed in sociological studies of law in which the law had been treated as a given (Hunt, 1982:96; Spitzer, 1983:104). Renewed critical interest included "a veritable explosion of interest among Marxists in the study of law, crime and deviance" (Beirne and Quinney, 1982:15). The sociological debate unfortunately subsided into an unfruitful "coercion-consensus" stand-off not helped by the fact that each camp held a different conception of "law" and "order" (Turk, 1976:284-286) or that conflict theorists tended to focus on the historical origins of laws while consensus proponents examined patterns of contemporary law enforcement (Grimes, 1979:51; Hopkins, 1975:614). Common ground began to appear with the general acceptance of the dominance of consensus over coercive aspects of law in advanced capitalist systems (Hunt, 1982:95); mutually held tenets such as a willingness to appeal to empirical validation made attempts at reconciliation of the paradigms worthwhile (Turk, 1976:293).

All definitions of law agree that law is a form of social control, that laws are social norms enforced by the state (Rich, 1978:160).

For example:

> "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting" (Hoebel in Chambliss and Seidman, 1982:4).

For Weber:

> "An order will be called law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose" (Hunt, 1978:103).

Feeley (1978) takes issue with coercive, command-centred definitions, pointing to a dynamic, facilitative role for law in complex societies. In addition to its prohibitive elements law is also prescriptive in that it grants authority, defines jurisdiction and stipulates procedural rules and discretionary powers. A proscriptive definition of law is modelled on criminal law to the neglect of civil and administrative/regulatory law (p. 19). A sociology of law must identify different types of law, how they relate to one another and how they differentially affect social relations (Ehrlich in Reasons and Rich, 1978: 151).

Consensus and conflict oriented students of law have starkly different views of the purpose and possibilities of a sociology of law. Black (1978) advocates a "purely" sociological approach bereft of all jurisprudence and policy implications (p. 98). He believes a sociology of law should eschew all normative considerations as "political" and should confine itself to "a scientific analysis of life as a system of behaviour" (p. 98). For Black law consists of the observable acts of judges, lawyers and other actors in the legal system. In his view the scholarly objective should be a "scientific" general theory of law (p. 98).

Black's positivist and technocratic view is countered by Nonet (1978) who argues for a philosophy of law as an integral component of sociological analyses of legal phenomena, with policy ramifications uppermost in mind (pp. 118-119). Sociological analyses of law in Nonet's opinion should be normative, critical of existing law and legal practices and should endeavour always to clarify the social basis of laws. Problematic aspects of human behaviour should be singled out for examination, given a lack of contiguity between morality and law (p. 117). "There is no way to study human affairs and not to make statements about issues that matter deeply ... about values" (p. 130). Black's dismissal of a normative orientation as "ideology" is itself ideological and his "general theory of law", intended to account for all types of law in all societies in all historical periods, is hopelessly positivistic (p. 117). Facts, problems, values and interests, Nonet argues, must be accounted for. Jurisprudence and policy-making must inform one another analytically, descriptively, evaluatively, probing such matters as the role of coercion, the symbiosis of law and politics and the relationship of legality to morality (p. 131). It is this latter view that embodies the discussion of law and the state in this chapter, a minority opinion according to Rich (1978:177) who contends that in the sociology of law "most theorists have been and continue to be adherents of structural-functional theory". The consensus paradigm is not only vibrant within sociology but also pervades state pronouncements on matters of law as well as those of the legal profession itself through such mouthpieces as the reports of the Law Reform Commission (Goode, 1978).[23] It is a conception of social order that counsels every citizen to obey every law "even if he does not like it" (Arnold, 1969:47). Law is alleged to rest upon a consensus of social values derived from morality (Durkheim, 1969:20; Pound in Boyd, 1986:3). Law epitomizes an ideal of social relations, reconciling conflict and constraining domination (Lukes and Scull, 1983:23; Parsons in Boyd, 1986:5) within a social context in which no one is "above the law" (Arnold, 1969:48).

The Advent of the Conflict Paradigm

It was this dominant consensus paradigm that was challenged in the late 1960's and the decade that followed, in the throes of a struggle for economic, sexual and racial justice and the demonstrated partiality of the legal order in its handling of the crimes of the politically and economically powerful. These events were alluded to by proponents of the "new criminology", many of whom called for a Marxian approach to the question of law (Spitzer, 1983: 104). Since then a "critical conflict perspective" has heralded a paradigmatic shift in the sociology of law and social control (Greenaway, 1978:226), supported by a growing body of empirical data (Akers in Rich, 1978:168; McDonald, 1976:211-212, 250-251).

The emerging paradigm owes much to Marx and Engels although neither gave sustained attention to law (Spitzer, 1983:104) or even defined it (Cain, 1982:65). Nevertheless, the basis for a Marxian theory of law is thought by some theorists to be salvageable from Marx' and Engels' sporadic references (Balbus, 1977:575; Collins, 1982:22).

For Marx legal relations "have their roots in the material conditions of life ..." (Tucker, 1978:4). The "economic structure of society" constitutes:

> "... the real foundation, on which rises a legal and political superstructure, and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general" (p. 4).

Three themes in Marx' and Engels' treatment of law are discernible (Reasons and Rich, 1978:153). The first perceives law as ideology regulating class struggle in that it "can set the ground on which struggles must be fought and by so doing, may, in particular cases, influence the outcome" (Cain, 1982:67). Like other ideological forms law appears to be formulated independently of economic structure but is actually the necessary legal expression of the mode of production and the class relations spawned by it. Indeed for Marx it was the appearance of autonomy that gave law its power as ideology. Law was a material constituent of capitalism, for without the legal concept of the wage relation and property, capitalism could not be conceptualized (Cain and Hunt, 1979:108-109).

Secondly, law is portrayed by Marx and Engels as a means of mystification and legitimation of the social order and an expression of the unity and average interests of the ruling class as a whole. The structured inequalities of class societies were mystified as "equality of citizens" before the law. It was in the interests of the ruling class to sanction the existing order as law and by so doing "give a general form to its mean average interest" (Tucker, 1978: 187). In "The German Ideology" Marx reveals that the medium for this undertaking is the state.

> "Since the State is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomised, it follows that the State mediates in the formation of all common institutions and that the institutions receive a political form. Hence the illusion that law is based on the will, and indeed on the will divorced from its real basis - on free will. Similarly justice is in its turn reduced to

the actual laws" (Tucker, 1978:187).

Thirdly, law appears as an instrument of social change. In this context law may be used to a limited extent to benefit subordinate groups and classes, particularly when the ruling class is divided against itself, when alliances can be formed among subordinate classes or class fractions or in circumstances when they constitute a particular threat to the ruling class (Cain, 1982:71-72). Such gains are limited to absorbable reforms since class relations determine legal forms "in the last instance" (Cain and Hunt, 1979:50). Changes in law will not in themselves transform class relations (Cain, 1982:72).

Marx' discussion of law is skeletal and potentially misleading. The "base-superstructure" imagery is just that, a metaphor or heuristic device (Cain and Hunt, 1979:49) meant to convey the idea "that the upper floors could not 'stay up' (in the air) alone, if they did not rest precisely on their base" (Althusser, 1971:135). That a hard core deterministic model was not intended was later made clear by Engels. The state apparatus, including legal institutions, was relatively autonomous from the economic base which was nevertheless "the ultimately determining element in history" (Tucker, 1978:760). Engels' remarks have constituted the basis for a post-classical "loosening project" (Spitzer, 1983:105). What requires clarification are the precise conditions in which "the production and reproduction of real life" is determined overall (Cain and Hunt, 1979:50). If law is a weapon which can be turned against the dominant class, the development of a Marxian sociology of law lies in "specifying the conditions under which the rule of law and the 'rights' it provides are in fact a barrier to power, an extension of power, or both" (Spitzer, 1983:112).

The conflict paradigm contains a variety of theories, many of which owe a debt to Marx. These have variously emphasized the role of "moral entrepreneurs" (Becker, 1963: 147:163), bureaucratic self-interest and interest group competition for state favours (Chambliss and Seidman, 1971; 1982), a class-instrumental "end of law" thesis (Quinney, 1978) and an "inherent conflict" perspective. It is the last of these that is most characteristically Marxian in its reasoning and will be taken up here.

What distinguishes a Marxian thrust from other conflict perspectives is its conception of the state, the use of dialectical reasoning and the view that law regulates class and other forms of conflict (centering on race, gender, welfare rights and such; Hirst, 1979:1). These spring from deeply structured inherent contradictions[24] within capitalism, chief of which is that between capital and labour which decrees that while the creation of new wealth is of necessity a social undertaking, the appropriation of that wealth is the sole concern of the privileged class of owners of capital.

The distinctive approach of Marxists to the issue of law can be seen in the questions they ask. How can the class nature of law be explained? How do we account for the form and content of law under capitalism? How does the law serve the capitalist class and what potential does law have for reform? (Brickey and Comack, 1986:17, 20).

From a dialectical perspective all efforts to resolve conflict by a state apparatus enjoined to defend class privilege is doomed to failure. A dialectical approach is found in the work of Chambliss (Chambliss, 1986; Chambliss and Seidman, 1971; 1982) and Sacco (1986). Chambliss (1986) argues that law serves a pluralism of interests and emanates from conflict at many levels, whose origin is structural contradictions. These contradictions are left unaddressed by legal overtures which recognize only the immediate situational causes of conflict (p. 31). To do otherwise would be to disrupt the patterns of social relations essential for the continuance of capitalism.

> "A contradiction is established in a particular historical period when the working out of the logic of the social structure and ideology must necessarily destroy some fundamental aspects of existing social relations" (p. 30).

Since the structural root of conflict is unaffected, new conflicts and contradictions appear and old conflicts reappear in new guises, requiring further cosmetic legislation. Law making, far from being instrumental, reflects conflict of an intra- as well as inter-class nature (Sacco, 1986:94). The state and dominant class must respond to the insistent demands of subordinate classes and will occasionally concede to them (Chambliss, 1986: 39-40). The exact circumstances in which the dominant class is likely to win or lose can only be ascertained empirically (Hopkins, 1975:617-618). Even so the outcome of any particular struggle, contingent on the balance of political and economic forces prevailing at that time, can never be predicted with any degree of certainty (Trubek, 1977:561).

Law making in a class system often reflects class dominance but also represents emancipatory struggle by the dominated who are in specific instances able to redefine the terms of their submission (Boyd, 1986:13-14; Chambliss and Seidman, 1982:202). Law currently possessing consensus may have been contentious in origin (Boyd, 1986:14). Business, for example, has opposed regulatory measures which were later seen to be advantageous, at least to large corporate players (Chambliss, 1986:38).[25] Much law making in complex societies will be a reflection of self-justificatory bureaucratic interests on the part of the state and corporate capital (Chambliss and Seidman, 1982: 285-291).

Fundamentally, however, a dialectical account of law making is about human beings in defence of group or class interests entering into conflict, whose source is the irreconcilable structural contradictions of their social systems, but with "people squarely in the middle of these contradictions ..." (Chambliss, 1986:50).

What all conflict theories point to and which Marxian derived critiques of law most clearly highlight is the contrast between formal,[26] legal equality at the level of citizenship and the economic inequality of human subjects in a class system (Brickey and Comack, 1986:20; Trubek, 1977:541). Formal rights "abstract from the concrete social existence of individuals" (Fine, 1979:39) and the law in mediating between socially, politically and economically unequal factions necessarily does so to some extent unsuccessfully (Trubek, 1977:542).

That ideals endorsed in law are simultaneously asserted and negated in practice does not mean they are entirely duplicitous; legal ideals have a social basis (Fine, 1979: 39), but structural inequalities in stratified societies are basically impervious to change (Trubek, 1977:544-545).

This ideological-structural incongruence reveals itself as a "gap" between law as written and as practiced, a disparity acknowledged by liberals as well as their radicalized critics (Arnold, 1969:46-47; Balbus, 1977:582; Feeley, 1978:14). The gap is treated as inherent, a "pervasive if not constitutive feature of legal life in liberal societies" (Trubek, 1977:540). "Radicals" see a greater ideological significance in the gap and therefore hold a fundamentally different interpretation of what the discrepancy means (p. 556), a matter calling for an empirical resolution (Feeley, 1978:14).

Law as Ideology

As has been seen, contemporary work in the sociology of law has attempted to modify the class reductionism of Marx. In the sphere of ideology this means breaking out from the "ideology equals false consciousness" equation (Spitzer, 1983:119). Legal ideology is under the control of the dominant class:

> "... in a broad sense but it does not always originate in economic class conflict, function well for the ruling class, reflect the full range of ruling class opinion, remain immune from the lawyers and bureaucrats who administer it or serve economic ends" (Sumner, 1979:255).

For one thing groups other than classes make law (Collins, 1982:52). Law can only operate on the basis of consensus, whether "spontaneous" or "constructed" (Sumner, 1979:269) and therefore the interests of many class fractions and interest groups must be accommodated. Yet a Marxian view must assert that the long-term and overall interests of the bourgeoisie are safeguarded by law. Collins (1982:57-58) argues that this is attainable because reform movements and pressure groups pursue their objectives within "a plastic and omnipresent ideology" (p. 58) woven by the dominant class, and laws will "in the main be compatible with that ideology" (p. 58). For this reason legislative "victories" for factions outside the economic elite may not subsequently fulfil their promise; class struggle determines how meaningfully the law is enforced (p. 48). Although law represents a pluralism of interests it does not do so equally; law is a reflection of class inequality and in the last resort law reproduces class power (Sumner, 1979:270). Each item of legislation "must be examined independently for its economic, political and cultural roots" (p. 253).

Laws are "displays of ideology" (p. 7), and ideology "of the fullest complexity" (p. 270) made up of "contemporary general concepts, the language of moral discourse, descriptive accounts and references, and doctrines and terms from the distant past" (p. 274). Ideology "clustered" in law (p. 52) is distinguished from other ideological forms by its political backing (p. 266). As such legal ideology has its origin in the political and cultural (as well as economic) practices of its social environment (pp. 255-256).

The presence of a dominant ideology notwithstanding, other classes and groups have their own ideologies which must also receive legal recognition (p. 269). Laws are drawn from an "ideological pool" (Spitzer, 1983:114) whose content is constantly evolving (pp. 16-17). The hegemony of a dominant ideology should not, then, be overstressed, for its stricture that "all must obey the law" must contend with "one law for the rich and another for the poor" (Sumner, 1979: 263). Providing such insights do not become too prevalent and acted upon, legal ideology will continue to perform its function of legitimizing the social order.[27] Laws are only as effective as their ideological components; their coercive content will be mobilized in inverse relation to the success of the accompanying ideology, but both are indispensable. "Law is not only ideology backed by instituted social power, it is also instituted social power articulated and reinforced by ideology" (p. 265).

An important adjunct to mystification of the class basis of law is its "magical", "holy", mysterious self-representation through the medium of ceremonial apparel, esoteric language and symbolic ritual (Arnold, 1969:49; Chambliss and Seidman, 1982:316; Quinney, 1978:69), taken as seriously by rulers as by the ruled (Spitzer, 1983:115).

> "Consent can be obtained much more easily if the rulers' main policies and principles of administration can be seen as an expression of something transcendental, whether this be a God or Absolute Reason or the Necessity of Order. The production of this mystification of law began a long time ago and we inherit some of the older illusions. However, the mystification of the nature of law (as a form) is still necessary today and will be as long as there is class domination. In short, the ideology of Law is an ideology necessitated by political relations of domination: it enables them to continue on a regular basis" (Sumner, 1979:275-276).

From a Marxian perspective the ideals of law are irreconcilable with a social system rife with structural inequalities; "class inequality inevitably breeds legal inequality" (Milovanovic, 1983:361). In liberal democracies the "solution" to the ideological-structural "gap" is contained in the legal form; law is presented as "autonomous" (independent of specific interests) and "general" (judicial decision making is conducted according to pre-existing rules and precedents without regard to the social status of the parties involved). In so doing legality invokes the ideals of equality (equal treatment by the state), individuality and community (each citizen is a contributing member of a community of citizens all of whom have equal legal status (Trubek, 1977:546-550). This legal form mystifies social reality, superimposing "equality" of legal subjects upon the class system (p. 553).

Unequal individuals, as Marx recognized in his "Critique of the Gotha Program":

> "... are measurable only by an equal standard in so far as they are brought under an equal point of view, are taken from one definite side only, ...

and nothing more is seen in them, everything else being ignored" (Tucker, 1978:530-531).

Marx recognized that a ruling class was constrained by its own laws (Cain and Hunt, 1979:217). No legal system could prevail which did not satisfy the demands of groups outside the dominant class (Beirne, 1979:380): sometimes justice must be seen to be done even if it means the defeat of elites on specific issues (Brickey and Comack, 1986:20; Thompson, 1982:133; Trubeck, 1977:557). The long-term interests of the capital-owning class are better served in the defence of such legal ideals as "equality before the law" than in ensuring victories on any specific issue (Cain, 1982:68).

> "In the short run, the state often routinely enacts and pursues policies that are unambiguously opposed to the private interests of sections of capital. Obvious examples of such policies are antitrust laws, green belt and zoning ordinances, corporation taxes, and the compulsory determination of mimimum wage and maximum interest levels. Sufficient conditions for the realization of these policies are the exercise of state legitimation functions or successful political struggle by dominated classes. We should, therefore, expect empirical and historical analysis to reveal that the content of legislation will not always operate in the objective interests of capital. Some laws are directly the product of class struggles and reproduce the political power of combatants in them. Some laws favour specific classes, some laws cut across all class boundaries. Some laws have little or nothing overtly to do with class struggles" (Beirne and Quinney, 1982:19-20).

Legitimation of the legal order of capitalist social systems, however, does not rest on the outcome of any specific legal issue but in "the fact that its claims or pledges are valued in the first place" (Balbus, 1977:581).

> "As long as 'formality', 'generality', and 'equality before the law' are seen as genuine human values, even gross and systematic departures from these norms in practice will not serve to delegitimate the legal order as a whole, but will at most tend to delegitimate specific laws and specific incumbents of political office who are responsible for these laws ... Such practices may in fact delegitimize particular judges and particular court systems, but they will not delegitimate the legal order itself, insofar as the delegitimation of the former does not call into question, but rather is based on the affirmation of, a central criterion of the legal order, equal treatment irrespective of class position" (p. 581).

It is the underlying ideal of "equality" and the legal form itself[28] that must be critiqued if the legal order is to be delegitimized, a consequence of which would be that an alternative concept of equality is arrived at in which "the rich pay more" for the same crimes (p. 585). In so doing law is "defetishized".[29]

Rule of Law

The matter of how seriously bourgeois law should be taken is a controversial one among Marxists. Thompson (1982) has argued forcefully that English law is substantive and the product of hard won class struggles from the sixteenth century onward (p. 133). Law for Thompson is "a true and important cultural achievement", an "unqualified human good" (p. 135). Even in the rigidly hierarchical class structure of eighteenth century England, Thompson maintains, the rule of law imbued social and economic life, displacing religion as the normative standard of daily life (p. 133). Law was at the centre of class conflict because subordinate classes on occasion availed themselves of its provisions, and even less occasionally were successful in disputes with large landowners. As Hay (1975) has shown eighteenth century English law was extraordinarily successful at the ideological level, but Thompson (1982) argues that its success lay precisely in the perception that the ruling class was subject to the law of property even if they owned most of it. While law in "a context of gross inequalities ... must always be in part sham" (p. 135), in order to be of any use as ideology law must "display an independence from gross manipulation and shall seem to be just" (p. 133). Then and now the class wielding political power was unable to manipulate the law at will and it was to their advantage that it was so (Beirne and Quinney, 1982:11). The capitalist class of today "as a whole cannot be well served by frequent and visible abuses of due process" (Beirne, 1979:379). In eighteenth century England law mediated class relations, one effect of which was to delimit the considerable power of the ruling class. This is precisely the value of the rule of law for Thompson, that it constitutes a barrier against the arbitrary use of "direct unmediated force", if only in "certain limited areas" (p. 134). The ruling class ruled but not absolutely.

In reply to Thompson, Redhead (1982) cautions that forms of legality must be analyzed in their socio-historical contexts (p. 334) and that continuity of function cannot be assumed. Seldom has a dominant class had the prescience to freely bestow legal rights on subordinate groups with an eye on long-term dominant class interests. All concessions are achieved only in prolonged struggle and must then be defended against attempts to retrieve them. Privileges and rights may be withdrawn when sufficient numbers of citizens make use of them; extra-legal behaviour such as civil disobedience may be accommodated by the state until resistance to authority reaches critical proportions. At such time a body of repressive law kept in reserve may be operationalized (Quinney, 1978:52-59).

At such times the dominant class risks betraying the contingency-laden nature of legal rights and vitiating legitimacy of the social order (Thompson, 1982:133). Under normal hegemonic[30] conditions both the state and specific agglomerations of capital will be subject to legal constraints by means of due process of law (Balbus, 1973;[31] Beirne, 1979:379; Spitzer, 1983:111-113). Rights such as habeas corpus, trial by jury and the right of labour to organize are effective restraints on state intrusions (Spitzer, 1983:112). The promotion of the legal ideals of freedom, equality and justice enjoins the state to act against specific corporate capitals or industrial sectors (Brickey and Comack, 1986:159; Hepburn, 1978:78). Such state initiatives constitute "a brake on renegade capitalists and a coordinating, organizing and regulating factor in the interests of capitalism" (Spitzer, 1983:113). Since most state interventions are motivated by the defence of capital even while enhancing the legitimacy of the social order, the state remains securely in the service of capital. "In the long run, the capitalist state is a capitalist state because it expresses the political interests of capital" (Beirne and Quinney, 1982:19). The state intervenes only against the most blatant corporate abuses and otherwise accords corporate power a high degree of immunity from prosecution. In advanced capitalism "the development of state and corporate bureaucracies scarcely touched by legal regulation or any other form of public accountability ..." is one indication of the class character of law (Fine, 1979:31). One must conclude that the state is capable of intervening against any specific corporation or corporations but does so selectively, contingent on a variety of factors, and not routinely. One is not justified in adopting Hepburn's (1978:78) overgeneralization that law apparently antithetical to corporate interests constitutes" a token gesture ... incapable of enforcement ... or is not meant to be enforced".

As capitalism has advanced its structural complexity and growing contradictions have necessitated precise state responses in the form of an increasingly elaborate regulatory bureaucracy (Picciotto, 1979:176). The procedural rules are very different from those of the criminal courts, with the consequence that state regulated monopoly capitalism has precipitated "an erosion of the rule of Law" and its replacement by an ad hoc, technocratic mode of control (Balbus, 1977:586). The emergence of "major centres of private bureaucratic power" in monopoly capitalism has necessitated their regulation by equally bureaucratic (albeit highly discretionary) means (Trubek, 1977:562). Formal judicial review of regulatory decisions, where it is found,

> "... serves to maintain the fiction that the universality of law and observance of procedural 'natural justice' are not affected, but this is an increasingly hollow myth" (Picciotto, 1979:176).

The Class Basis of Law

A Marxian sociology of law contends that the chief beneficiary of the legal structure is the capitalist class. If immediate and long-term interests of capital are distinguished, it can be seen that the latter are protected by law (Beirne, 1979:382, 380). All laws, then, are not directly tied to the interests of capital. Each legislative act must be examined for the political and economic interests underlying it (Beirne and Quinney, 1982:11; Fine, 1979:34). Criminal laws dealing with drug use, abortion, sexual deviance and interpersonal violence do not directly threaten the dominance of the economic elite, but they are ideologically useful as they meet the moralistic demands of some groups and represent fragments of the "real crime problem" for most citizens, thus diverting attention from the mayhem and large-scale fraud perpetrated by the corporate sector (Hepburn, 1978:76).[32] Criminal law, like all law, is ideologically based and selective in its definitional criteria, tending, for example, to hold individuals rather than institutions liable for their anti-social behaviour (p. 75).

The class bias of law is not to be found in the reading of any specific statute. The meaning of law in western capitalist societies cannot be grasped "in isolation from the social relationships of production and exchange" (Beirne, 1979:382). The exchange of "commodities", such as labour power for wages, presents an appearance of equality and common-sense "fairness" between "equal" legal subjects, but it is equality in form only. The essence of the labour-capital relation is exploitative, not symbiotic, but is only seen as such when we shift from the level of economic exchange to that of production (Marx, 1954, vol. I:172).

> "Behind the form lies the constant reproduction of expropriation without return. To analyze the form of law, without relating it to its content within social relations of production, will allow us to see the commodity relation which it conceals within itself and beneath its idealization of the "free" subject. But it will not allow us to discover the specifically class character of bourgeois legality. This is not hidden in the form itself; only in the inner connection between bourgeois legality and the relations of production founded on the expropriation of labour" (Fine, 1979:43).

This should be borne in mind in the "rule of law" debate; if legal rights wrung from the unwilling hands of the owners of production are in themselves "an unqualified human good" (Thompson, 1982:135), no amount of such rights will transfer the means of production from private to public ownership (Fine, 1979:44). Pledges will be honoured only insofar as they do not threaten the structure of the capitalist system (Trubek, 1977:557-558). Law has autonomy from specific capitalist interests but not from capitalism as a whole, and thus can be said to "serve the interests of capital as a class" (Balbus, 1977:

585). Investing the law with relative autonomy from capitalism per se would require major constitutional changes and the restructuring of the state apparatus.

The logic of juridical procedure allows a glimpse of class bias. For conflict to be successfully dispelled its causes must be presented in other than class terms (Brickey and Comack, 1986:84-85). In the courtroom the dominant ideology prevails throughout, social reality is "encoded" in terms compatible with orthodox understandings, and intersubjective meanings informing appreciation of the immediate context of the offence and its motive, endemic to lower-class culture, are decontextualized and discounted (Milovanovic, 1983:365, 362).[33] Judgement has more to do with "communicative and interactive work than with formal legal procedural techniques used to establish 'what happened'" (p. 362). Those most able to anticipate acceptable renditions of reality are persons of elevated socio-economic status (p. 366) and are affiliated with the monopoly capital market sector (Mandel, 1986:153; Milovanovic, 1983:366).[34]

The behaviours customarily prohibited by criminal law in capitalist societies "although applying formally to all, predominantly concern behaviour which is typically engaged in by the less advantaged sections of society" (Hopkins, 1986:127). Crimes by business receive the euphemism of "regulatory offences" and more lenient treatment from courts (Mandel, 1986:152). When persons of high socio-economic status appear in the criminal courts charged with such white-collar offences as insider trading and overcharging, procedural practices on such matters as intent, strict liability and "reverse onus of proof" favour them over their lower-class counterparts charged with conventional crimes such as murder or burglary (Hopkins, 1986). In discussing such extra-legal variables as the "character" of the offender, "contribution to the community", the likely effect of imprisonment, degree of loss of reputation and prospects for rehabilitation, the white-collar offender is better positioned to meet the court's standards of bourgeois respectability (Mandel, 1986:138).

Conclusion

Having reviewed the theoretical debate concerning the nature and role of the advanced capitalist state and the function of law in late capitalist societies, it remains in light of this literature to examine particular instances of Canadian state structure and combines regulatory law. In doing so the relevance of the debate for the Canadian case can be assessed. In particular the ramifications of the instrumental-structural debate need to be worked out by means of a sample of combines regulatory cases which reveal a pattern of enforcement in a defined time period. Such data may allow for pronouncements on the relationship of the Canadian state to corporate economic power and the scope of its interventionary capability.

FOOTNOTES

1 Taylor, Walton and Young (1973), who gave the expression currency, point out that the "new" criminology is in fact a return to the "old" holistic approach of Marx and Durkheim who discussed crime in the context of the mode of production, forced division of labour, the class system and alienation (pp. 274, 278-279). The term is adopted here as an "umbrella" category for all conflict-oriented perspectives on crime, while recognizing there are important differences of view to be found among adherents of the perspective.

Sykes (1974:208-209) believes the main themes of the "new criminology" to be: (1) a skepticism about individualistic theories of crime causation, (2) a questioning of the motives of control agencies, (3) treatment of the law as a mystified "consensus of values", (4) a scepticism about crime statistics.

2 The work of writers such as Chambliss and Quinney is difficult to classify within a "new criminology" typology since their views have clearly altered with the passage of time. Quinney's work in the early 1960's, for instance, shows little co-authorship with his "Critique of the Legal Order" (1974) or "Class, State and Crime" (1977). By the second edition of the latter Quinney (1980) was manifesting another major shift in his position in what appeared to be an attempt to fuse Marxian and religious humanism. His last major publication (1982) left criminology behind and is concerned with existential and ontological questions (Friedrichs, 1984:183-186).

Chambliss followed a similar path in the 1970's, moving to a more explicitly Marxian stance. In Pelfrey's categorization, between 1971 ("Law, Order and Power") in 1976 ("The State and Criminal Law") Chambliss moved from a conflict to a critical perspective (Pelfrey, 1980:73).

3 Pelfrey's categorization of new criminologists has an arbitrary quality to it. Krisberg (1975) is nominated as a critical criminologist on the basis of some of his statements although "Krisberg is correctly classified as a radical criminologist" (p. 74). Taylor, Walton and Young (1973) are also designated as critical criminologists "even though the authors tend to see themselves as 'radical criminologists'" (p. 83).

For Michalowski (1981:47) "critical criminology" means something quite different. "Critical criminology, as it is used here, refers to a scenario for the evolution of radical criminology, which as yet is only partially unfolded". For Michalowski the continuum is conflict - radical - critical, while for Pelfrey it is conflict - critical - radical, inculcating an increasing emphasis on praxis and a diminution of theory (Pelfrey, 1980:86). Sykes' (1974) use of "critical criminology", on the other hand, refers to new criminologists as a whole. Friedrichs (1980 : 40) includes as radical criminologists: Chambliss, Pepinsky, Michalowski, Krisberg, Reiman and Humphries.

4 By praxis is meant practical, critical activity guided by theory, whose objective is progressive social change.

5 By the "economically powerful" is meant: (a) those persons who possess corporate ownership rights entitling them to participate in policy formulation, b) professional corporate management acting in the name of major stockholders. The "politically powerful" are taken to be those occupying high level positions in the executive, judicial, military, paramilitary and bureaucratic branches of the state apparatus.

6 Given their demotion of theory to epiphenomenal status it is hardly surprising that radical criminologists despair of academe as a locale in which a radical criminology can be developed (Platt, 1975: 101-104, 105-107). Radicals such as Tony Platt, Paul Takagi and Herman and Julia Schwendinger have had first-hand experience of the cooptive influence of the academic environment at the School of Criminology of the University of Berkeley. The School was closed in 1976 as a last resort to quash the radicalism of a minority of faculty and a majority of students. The closure destroyed the proximity essential for the development of the radical view and the training of radical criminologists. One response to the closure of the School has been the establishment of the Union of Radical Criminologists and the journal "Crime and Social Justice" (Platt and Shank, 1976:1-3).

7 Society originates in "a social contract" by which individuals delegate to the "community" the right to defend each person and his property and to exact recompense for wrongs done. Henceforth the community is sovereign and all persons enjoy collective security.

From civil society arises government and law by consent of the citizenry. The purpose of political power is to make laws for the public good. The purpose of law is "not to abolish or restrain, but to preserve and enlarge freedom" (Locke, 1975:143). Legitimate law is known to and approved by the people and enforceable against all citizens by a disinterested judiciary.

Legitimate government is that appointed by electors and is subjected to constitutional law. Power is fiduciary, bestowed for the fixed period of time; government may then be recalled at any time if that trust is betrayed. If necessary the people may rise up and remove their government by force, for sovereignty rests in the last instance with the community.

Locke's work was largely a polemic against the concept of absolute monarchy. The "people" are by definition property owners and "equality" refers to equality of rights among property owners rather than equality in any egalitarian sense.

8 Macpherson (1965) defines liberal democracy as the political expression of capitalism, combining "a large measure of individual liberty with a fair approximation to majority rule" (p. 3). The role of the liberal democratic state is the maintenance of social relations and the protection of rights, particularly those pertaining to private property. Macpherson perceives that in any society where freedom is defined as the right to acquire and retain property, some citizens will be more "free" than others.

9 American political theorists write with the United States principally in mind. The political elite in the United States is defined by Rose (1967:491) as the President, the Congress, the two major parties and the executives and legislatures of states and large cities, all of whom of course "check-and-balance each other to a considerable extent".

10 In fact the electorate is being flatterd. Once in office the advantages of incumbency minimize the chances of being electorally unseated. Between 1945 and 1970, 93 per cent of all Congressional incumbents were re-elected (Green, 1972:266). In the 1972 election (in which the "free press" remained oblivious to the political scandal of the century), 365 of 378 Congressional incumbents received a renewed "mandate" (White, 1973:459).

11 Dahl (1976:364) maintains that while Americans have not totally abandoned political ideology, "they have to an astounding extent, all agreed on the same ideology". In the last ten years the boundaries of legitimate political thinking have contracted even further in the United States with the swing to the

right: "It's a democracy with one party on the right, one in the centre, a choice between moderate and strong conservatism. Absent is liberalism and that black word, socialism" (Globe and Mail, April 13, 1987).

12 The electorate seems increasingly dubious about the product. Offe (1984:169-170) discerns public disillusionment with the competitive party system of western democracies as parties have shifted from class-based organisms to "catch-all" vote gathering machines. At the same time the "professionalization" of politics has produced party leaders drawn from a diminishing social base and therefore demographically unrepresentative. Offe is prepared to argue that the competitive party system "has exhausted much of its usefulness for reconciling capitalism and mass politics" (p. 188). In Canada, Chorney and Hanson (1980) see a similar "decline in the level of quality of public life" (p. 69) reflected by a high "undecided" category of voters. A "sameness" has enveloped all three federal parties in Canada as all appear to have shifted to the right of positions traditionally attributed to them. A growing superficiality in Canadian political culture is suggested by a concern to appease public opinion by short-term technocratic responses (with an eye to poll standings and electoral prospects) to long-term structural problems, and a preoccupation with "style", "leadership" and personalities (p. 69). Chorney and Hanson believe there is a growing opinion that "perhaps democracy itself is not sufficiently flexible to deal with the problems facing capitalist economies" (p. 70). Certainly there is clear evidence at the present time that the two federal bourgeois parties have lost support to the New Democratic Party, with the ruling Progressive Conservatives recording just 24 per cent of decided voter support, "a modern-day low for the federal government" (Globe and Mail, March 31, 1987: A1, A2).

The declining ability of the traditional party system to reconcile political legitimation with the exigencies of capital accumulation has created a space for new political practices which Offe (1984:188-193) enumerates as new social movements (such as environmentalism, consumerism, feminism, and the peace movement), corporatist collective agreements involving the state, business and labour and an increasingly authoritarian state response. Coleman (1986:147-151) has illustrated corporatist practices in Canada while Chorney and Hanson (1980:83) believe a "conservative-authoritarian" repressive response is a realistic state option given the absence of class consciousness and the failure of social democratic values to take root. A possible first step in that direction could be the Supreme Court of Canada ruling that the Charter of Rights and Freedoms does not guarantee workers the right to strike or bargain collectively (Edmonton Journal, April 10, 1987:A1).

13 The welfare state is defined "as a multi-functional and heterogeneous set of political and administrative institutions whose purpose is to manage the structures of socialization and the capitalist economy (Keane, 1984:13). While the welfare state is almost certainly here to stay political struggle has shifted to questions of the scope and provision of social welfare spending, and the issue of eligibility. These matters are accentuated by the quandary of increased state spending in conjunction with a shrinking tax base (McQuaig, 1987:215).

14 Blanke et al. (1978:129) define the advanced capitalist (welfare) state as "a general force of coercion which confronts even the individual bourgeois (individual competing capitals) as a separated, neutral instance, but which at the same time and only through this separation is, by virtue of its existence as a central force guaranteeing the law, a class force".

15 Chorney and Hanson (1980:73), discussing the Canadian situation, are in agreement with Dahrendorf. For them the class politics of the 1930's has degenerated "to the status of economic interest group bargaining ...".

16 Jessop (1982:229-231) distinguishes five forms of representation: clientelism, corporatism, parliamentarism, pluralism and raison d'etat, each offering degrees of access to the state apparatus. Clientelism involves an exchange of political support for state resources with the state as dominant partner. Corporatism features representation "on the basis of function within the division of labour" (p. 230), while functionally disparate participants share a formal equality. Through parliamentarism individual citizens participate indirectly in policy setting via the franchise and other rights. Formal equality between citizens is also the basis for pluralism "based on institutional channels of access ... for political forces representing interests and/or causes rooted in civil society ..." (p. 230). In the final case the state acts for political reasons "of its own", perhaps in response to prioritized interests operating through informal channels of representation, while legitimating its actions as in the "national interest" (p. 230).

Coleman (1986) sees "pressure pluralism", clientelism and corporatism as relevant to the Canadian situation (p. 139). All three practices are seen to be chiefly advantageous to business interests operating through trade associations (p. 151). In the pluralist context trade associations are numerous and well-funded and the accumulation aims of business are seen by the state as innately desirable without which the state would not derive the resources essential for its own policy making and operationalization (Coleman, 1986: 141; Hearn, 1984:130; Hirsch, 1978:66; Offe, 1984:120, 223). Clientelism offers associations the chance to negotiate with state officials "from the inside" (Coleman, 1986:143) and is particularly common in the area of state regulatory policy making and administration (pp. 143-144). Corporatism is most likely to be the format when labour is powerful, and represents a means of controlling and disciplining workers' organizations (p. 148). Sectorally clientelism is most likely to be found in resources, finance and banking and some areas of manufacturing, while corporatism is most common in construction and the agri-food business (p. 152).

17 The term "intervention" refers to the entire system management role of the state in an advanced capitalist economy. All such states are broadly interventionist in that they conduct routine forays into the private world of capital and perceive such action as an integral function of state policy. Intervention is generally welcomed by capital since in most instances the objective is to facilitate accumulation. In specific cases the state intervenes to obstruct specific capitals from pursuing particular corporate goals but does so in the systemic interests of capital as a whole.

18 Laissez-faire capitalism is characterized by non-mechanized manufacturing, the dominance of absolute surplus value, concentration of capital by means of reinvestment of surplus value within expanding individual capitals and the mediation of the law of value through market forces; simple monopoly capitalism features mechanized production, growing importance of relative surplus value as the labour process is reorganized, the centralization of capital by means of the merging of capitals, the mediation of the law of value through a system of private credit, the separation of ownership and control by monopolies, trusts and cartels. The state monopoly capitalist phase arises "from the attempts of the state to resolve economic crises through the further socialisation of the relations of production" (Jessop, 1982:55).

The state intervenes to counter the falling rate of profit (Chorney and Hanson, 1980:72); Niosi, 1981:72) and, in the case of late developing economies such as Canada's, the state represents the main stimulus to development (Niosi, 1981:77). In the face of a disinclination to invest due to the falling rate of profit the state absorbs surplus capital and creates employment in the public sector. International competition also demands that the state "rationalize capital by encouraging centralization" (Chorney and Hanson, 1980:73; Kierans, 1975:x-xv). The state is integrally involved in the circuit of capital by means of nationalization, taxation, state credit and subsidies. Politically the state coopts the subordinate classes within a corporatist social democratic framework in which political parties are integrated into the state apparatus (Jessop, 1982:54-56). Use of the term "stage of development" is not intended to imply that all capitalist societies deterministically proceed through specific and identifiable phases of evolution. Each capitalist system develops according to its own socio-historical attributes.

19 Stable class relations are sustained ideologically in legal terminology which presents commodity exchange (such as wages for goods manufactured) as "fair". In Marxian terms analysis at the level of commodity exchange conceals the expropriation of surplus value, the difference between the actual value of goods produced and the value of wages paid. The element of expropriation and the essentially exploitative nature of the labour-capital relation only becomes apparent when analysis is transferred to the sphere of production (Marx, 1954: vol. I:172).

20 Whether a "political crisis" of this nature accompanies the economic crisis will depend on the political culture in question (defined as "the quality of the political experience in everyday life; the self-images of citizens and their critical attitudes toward capitalism, democracy and institutions of government, and most importantly their aspirations for a different kind of social order ..."; Chorney and Hanson, 1980:66). Where democratic ideals have not taken firm hold "friendly fascism" is a possible outcome of the economic crisis.

21 The bourgeoisie is particularly prone to intra-class feuding, perhaps none more so than in Canada where they are geographically disparate and regionalized. Coleman (1986:139) notes that while industries are well represented by trade associations "there are very few structures that link these associations together, that form them into any hierarchical system, and hence that favour the articulation and defence

of the general interest of capital. Accomplishing these latter objectives is difficult in all capitalist states, but Canadian capital seems even further from reaching such a position than most national capitals".

22 Corporatism is a form of highly centralized group representation "where the state coordinates the activities of the private sector in more or less institutionalized consultation with the representation of a limited number of hierarchically organized, functionally differentiated, non-competitive, singular and compulsory interest associations unified about a common interest in social stability and economic prosperity" (Hearn, 1984:134-135). Bargaining usually takes a tripartite form of the state, capital and labour (Offe, 1984:291). Corporatism is seen as a depoliticized solution to the legitimation crisis of the liberal democratic state in that conflict is institutionalized at an elevated, "corporate" level of interest representation by which participants, in return for bargaining status, are expected to honour agreements (Hearn, 1984:138, 135; Offe, 1984:28, 158-159). The state gains enhanced manoeuvrability, appearing as a neutral arbitrator and enjoys greater protection from public opinion than is possible under conditions of relative autonomy (Coleman, 1986:148; Hearn, 1984:137).

23 In Goode's opinion the publications of the Law Reform Commission reflect a "liberal-positivist ideology" (p. 393) in which are to be found "a wealth of undisclosed and undiscussed assumptions about the nature of Canadian society, and democratic society in general ... about the internal validity of politically constituted, economically determined legal authority, and about the nature of social and legal authority itself" (pp. 392-393). Signs of ideological bias are decipherable from the use of such expressions as "core values" and "shared trust" which, when violated, are reinforced when "we" invoke the law (p. 392).

24 A contradiction is defined as "a set of relations that contain elements that cannot coexist and which by their incompatible nature undermine basic features of the society" (Chambliss and Seidman, 1982:202). Offe (1984) shows that contradictions in western capitalist systems abound at the economic, political and ideological levels. At the economic level the creation of the welfare state for the purpose of improving the circulation of human and economic resources has increasingly channeled those resources away from the private sector, and created a discincentive to work and to invest (p. 149). At the political level the state's attempts to "maintain and universa-

lize the commodity form require organizations whose mode of operation is no longer subject to the commodity form" (p. 127) and has resulted in struggles for control of the public sector serving capital (p. 128). At the ideological level the rationale of a welfare state supportive of the ethic of possessive individualism results in its erosion, in that exchange relationships are no longer seen as contingent on personal initiative but heavily mediated by the political sector (pp. 128-129). Capitalism finds it cannot "live with" the welfare state yet cannot survive without it (p. 153).

25 The social functions of laws may change over time while the legal norms remain the same (Collins, 1982:53; Fine, 1979:36-37; Kahn-Freund, 1969:32). Pre-capitalist and early capitalist laws may be adapted to the requirements of advanced capitalism (Kahn-Freund, 1969:32; Spitzer, 1983:118). The law of vagrancy, for example, was initially intended to prevent the migration of agrarian labour to the towns in conditions of chronic labour scarcity following the Black Death plague of the mid-fourteenth century. Subsequently it was used to counter urban riots (Collins, 1982:54). Canada's drug laws today serve purposes and include substances not contemplated by officialdom at the time of legislation (Comack, 1986; Green, 1986; Small, 1978).

Laws once passed may become passé because of subsequent legislation or changing mores. These legislative "survivals" indicate the presence of "lag" or "slippage" as expressions of the relative autonomy of law (Cardozo in Reasons and Rich, 1978:174; Collins, 1982:52-55; Spitzer, 1983:118). Laws do not always reflect public opinion as is clear for the issue of capital punishment (Greenaway, 1978:49). Some laws may be political compromises in which all factions believe they have "won" (Aubert, 1969). It may be in some instances that legal norms create public morality (Green, 1986:38).

26 Trubek (1977:561-562) defines legal formalism as "a set of beliefs about lawmaking and law finding. These beliefs include a faith in the possibility of creating rules, and in autonomous modes of legal thought that will ensure that rules are followed". Formalism is a desire for law that is "general, public and positive". For Weber formalism implied a "gapless" legal system covering every conceivable socially disapproved behaviour (Hunt, 1978:103-106; Milovanovic, 1983:354).

27 It is the functions served by law in particular socio-historical contexts that interest neo-Marxists rather than the content of those laws (Collins, 1982:13). These functions are seen as: (1) regulation of relations of possession, (2) regulation of class struggle (Hirst, 1979:96).

28 Marxists tend to focus on content of law to the neglect of the form of law itself. What are "the conditions in which the regulation of social relationships assume a legal character"? (Beirne, 1979:381). Why are the interests of capitalists better served by law than by blatant coercion? (Fine, 1979:35). Beirne's (1979:380) own response is not very helpful. "The answer ... appears to be that the legal form itself has an innate quality which represents and perpetuates the dominant mode of production within any social formation" (Holloway and Picciotto, 1978:18).

The best formulated response to this crucial question remains that of the Soviet legal theorist Evgeny Pashukanis (1978) who in the 1920's argued that the legal form was intrinsically bourgeois and would not survive the movement of history to socialism. In the course of attaining fully developed socialism one could expect to witness "the disappearance of the juridical factor from social relations" (p. 61). To believe that law was valid also for socialist systems was "commodity fetishism". As long as economic life was governed by the principle of commodity exchange the state and legal system would rule in the interests of the dominant class (p. 63). "Legal fetishism complements commodity fetishism" (p. 117). As commodities become bearers of value man becomes a bearer of rights. A homologous relationship prevails between the economic and legal, the capitalist mode of production determining the form of law. A social control system emerges which "exaggerates" the importance of law, mystifying it. This corresponds to a mode of production in which goods take on "a life of their own", dominating their producers.

29 The concept "legal fetishism" conveys the idea that law is indispensable for social order, that without law anarchy would break out and "we would all be killing each other". In the process of becoming fetishized law is conceptually transformed from an artifact of human intelligence over which people have control to one in which law becomes "subject" and its creators "objects". Law becomes an ineluctable force independent of and exerting power over civil society; society owes its existence to law rather than the reverse (Balbus, 1977: 582-584).

30 The concept of hegemony was coined by the Italian Marxist theoretician Gramsci, by which he meant leadership by a dominant class through the consent of subordinate classes. The dominant class owes its status as governing elite to the fact that it has the confidence of other classes as the strata perceived to be the most competent to rule, a perception which precedes the ascent to power (Gramsci, 1971:55-57, fn.). Hegemony is maintained until, because of administrative failure or the rise of political activism on the part of the ruled, that confidence is lost and a "crisis of hegemony" or "general crisis of the State" prevails (p. 210).

31 Using the ghetto riots in Los Angeles, Detroit and Chicago in the period 1965-1968, Balbus (1973) illustrates the "dialectics of legal repression" in the "liberal state". At the outset of the major riots the legal apparatus manifested a primary concern with restoring social order (over concerns with due process and organizational maintenance of the justice system itself), yet even at the height of the disturbances despite "serious and widespread" violations of legal rights (p. 232), "the abandonment of formal rationality was not a total one" (p. 234). Bail, though higher than normal, was set and offenders were charged, not merely detained (pp. 232, 233). Sectors of the legal system cooperated to take riotors off the streets and detain them for the duration of the violence (p. 273). Rather than subordinating due process and justice system maintenance concerns authorities attempted to maintain a balance of all three, while priorities shifted from one phase of the riots to another (p. 235). Once "the fires were out" the control system began "gearing down" and congestion of the system became a priority. Overcrowded jails were relieved of inmates while every effort was made to maintain an appearance of formal legal rationality (offenders were sentenced to time already served, a high proportion of cases were dismissed or charges were reduced in response to the police practice of overcharging at the time of arrest, sentences for felons were lenient by normal practices (pp. 237-239). All three cities showed "remarkably similar" policies both in "gearing up" and "gearing down" (p. 236). The experience showed that even in extraordinary circumstances due process and organizational concerns could not be abandoned (p. 240). "Such is the peculiar nature of repression in the liberal state" (p. 235).

32 Hepburn (1978) alleges that no criminal law can be passed in the face of opposition from the (monolithic) capitalist class. "Irrelevant laws, then, occur because the interests of the capitalist elite are not threatened". Little credit is given to forces outside

the elite to forcefully extract concessions from capitalists. Genovese (1982) has shown that even slaves found a use for the legal system (p. 76). There will be few occasions on which the elite are united. It is not criminal law that fundamentally ensures conformity to the norms of life under capitalism but, as Marx put it, the "dull compulsion of economic relations" (Spitzer, 1983:11).

33 Given the "narrow social base" (Olsen, 1980:44) from which lawyers and judges are drawn, it is not to be expected they would have much empathy for working-class cultural practices. By contrast, most lawyers appointed to high court positions (such as Supreme Court of Canada Justice, Chief Justice of the Federal Court, Provincial Chief Justice) have already had considerable experience with the business sector and its point of view (p. 51), and at the higher court level deal mainly with the affairs of the economic and professional elites (pp. 52, 55).

34 Such persons are also more likely to have the financial and intellectual means to defend their interests in civil law (Hopkins, 1986:135). Where the dispensing of justice is premised upon complaints from injured parties the lower classes are far less likely to be heard from (Olsen, 1980:62). In Olsen's view: "One has to conclude that both the judiciary and the legal profession are involved in maintaining a system of class justice in Canada. 'Justice' and 'equity' in their writings should be understood as ideological abstractions, which in operation apply fully only to the privileged position of the citizens who can afford to pay for them" (p. 57).

III. THE CANADIAN STATE AND THE REGULATORY FUNCTION

Introduction

In this chapter the evolution of the Canadian state is recounted and idiosyncratic structural features are noted which distance the Canadian apparatus from the general theoretical models discussed in the previous chapter. In particular the absence of a laissez-faire period, the central place of the state in the accumulation process and the decentralization of the state are discussed.

The discussion then turns to the state regulatory function and examines the regulatory apparatus, its origins and development.

A Marxian state model, whether in its instrumental or structural forms, is held to offer a better, though imperfect, basis for the construction of a theory of the Canadian regulatory state, than that of a liberal pluralist model. The chapter concludes by summarizing the principles of a Marxian approach to the annalysis of the Canadian state.

Evolution of the State

The Canadian idea of the state was largely drawn from the British model. With appropriate modifications British "Toryism" was transplanted and used to construct a society that would be hierarchical, elitist, authoritarian and undemocratic (Chorney and Hanson, 1980:85; Laxer, 1986:21).

From the beginning economic growth was forced, with the state as economic catalyst. A financial bourgeoisie rapidly came into being from mercantilist (fish and fur) beginnings, whose function it was to handle colonial investment from the "mother country" (Clark, 1984:204; Clement, 1975:45-49; Whitaker, 1977:34-38).

A political-religious-financial ruling elite quickly emerged, content to play a middleman role for British capital, with little concern for nurturing a strong indigenous manufacturing class (Clement, 1975:50). This elite would in time become a financial-railway-political oligarchy (pp. 60-62). Debt, fear of American absorption and the need to guarantee British portfolio investment were the major considerations precipitating Confederation (Aitken, 1980:203-205; Watkins, 1977:5), an event principally importuned by commercial capital and which elicited little enthusiasm from the majority of Canadians, whose views were not solicited in any case (Laxer, 1986:33, 45; Whitaker, 1977:44-45).

Given geographical considerations and a disparate population, a strong centralized state was essential in laying down the economic infrastructure (Traves, 1979:3). A history of private enterprise at public expense got underway, characterized by protectionism and incestuous state-business relations;[1] the state at this time was little more than a branch of the bourgeoisie in the persons of merchants, bankers and railway promoters (Buckley, 1967: 170; Laxer, 1986:9, 27; Moscovitch and Drover, 1987:17;

Whitaker, 1977:42). The mediation of conflicting demands would in time allow the state a growing degree of autonomy (Traves, 1979:158). A state apparatus would emerge which was "expansionist, satellitic and autonomous" (Aitken, 1980:186).

Up to 1900 an economic class ruled politically, at which time a commercial and financial ruling class came ~~into~~ being, Canadian entrepreneurship declined and American corporate penetration of the Canadian economy began, facilitated by the National Policy (Clark, 1984:204; Clement, 1975:64; Laxer, 1986:8). In other words, Canada as a matter of deliberate policy began to revert to colonial status after a brief national development phase, and the state's role henceforth would be to perpetuate that dependence by giving priority to the economic interests of the successor "imperial state" (Watkins, 1977:5-7).

From the beginning the Canadian state gave priority to accumulation over legitimation (Panitch, 1977:18-19; Stevenson, 1977:88). Legitimation would only receive serious attention from the state in the 1940's when social spending was undertaken, largely to maintain purchasing power and to pre-empt a leftward shift in public opinion as manifested by the Cooperative Commonwealth Federation movement (Finkel, 1977:360-361; Guest, 1987:217; Moscovitch and Drover, 1987:27-29).[2] Proposals for comprehensive social security and health coverage were vigorously opposed by big business, a majority of the Cabinet and senior bureaucrats (Guest, 1987:209; 216-217).

Social spending which was undertaken was of a minimal nature and was accompanied by growing state intervention in support of capitalism (Moscovitch and Drover, 1987:25). Reform was on the whole economically beneficial; educational improvements met industry's literacy needs (and the state's objective of shaping political consciousness: Curtis, 1983), shorter hours spread work around, unemployment insurance was seen to be less costly than direct relief and, together with minimum wage provisions, helped to sustain demand during recession periods. "Social consumption" expenditures (such as unemployment insurance payments and spending on education, health and welfare) constituted more than 50 per cent of government spending by the mid-1970's and helped to socialize labour costs while at the same time legitimizing capitalism (Moscovitch and Drover, 1987:36). Even this was only possible because a segment of the business elite perceived the long-term benefits of social welfare provision, and the financial outlay could be taxed back. Accumulation could proceed undisturbed.

Accumulation has been supported by a variety of state policies covering fiscal and monetary programs, grants, subsidies, land and immigration policy and the provision of infrastructure, as in the Syncrude "deal" (Panitch, 1977:14; Pratt, 1976). In addition the state has entered into the accumulation process more directly in the shape of crown corporations, development corporations and "joint ventures" with private capital, whenever the latter was unwilling to take the initiative (Clement, 1975:102;

Marchak, 1979:55; Olsen, 1980:6-7). Those who run such organizations may be regarded as the "state bourgeoisie" (Niosi, 1981:75).

The expansion of the state role inevitably meant growth of the state apparatus in step with the increase in the size of corporate capital (Traves, 1979:155). Big capital meant an increase in the potential social and economic consequences of bad decisions by the private sector, amply demonstrated by the present quandary of Dome Petroleum. A highly concentrated economy called for nothing less than a form of state capitalism to regulate it, an important element of which is the nationalization of firms providing an essential but unprofitable service (Niosi, 1981:72, 79).[3] In Canada state capitalism takes the following form:

> "(1) The market is deposed from its ruling function to co-ordinate production and distribution. This function has been taken over by a system of direct controls. Freedom of trade enterprise and labour are subject to governmental interference of such a degree that they are practically abolished. With the autonomous market the so-called economic laws disappear. (2) These controls are vested in the state which uses a combination of old and new devices, including a 'pseudo-market' for regulating and expanding production and co-ordinating it with consumption. Full employment of all resources is claimed as the main achievement in the economic field. The state transgresses all the limits drawn for peacetime state activities" (Chorney and Hanson, 1980:70).

State capitalism in Canada is more correctly viewed as a sector of capitalism, rather than a "phase", in which capital big and small can expect assistance from the state at both the federal and provincial levels (Niosi, 1981:80), compromises between conflicting interests can be arrived at and economic uncertainty ameliorated (Traves, 1979:158, 155). State capitalism in Canada was initially a defensive strategy designed to counter the danger of absorption by the United States. Subsequently it has been a response to the emergence of regional bourgeoisies such as the francophone entrepreneurial nouveau riche of Quebec and Alberta's indigenous oil and gas elite, both of whom demanded crown corporations and other developmental organisms as catalysts (Niosi, 1981:94; Richards and Pratt, 1979:183-184, 238-239). It is also a reflection of regional disparity, countering uneven development patterns across the country, and of the late and dependent nature of that development (pp. 94-96).

At no time has the Canadian economy approximated to a laissez-faire model. Business on the whole does not want competition and much prefers state regulation (Newman, 1975: 159; Trebilcock, 1976:362). Their attitude is fully shared by the state (Kierans, 1976:203), whose spokesman, Prime Minister Trudeau, clarified the situation when he said: "The free market system, in the true sense of that phrase, does not exist in Canada" (Trudeau, 1976:449). Indeed the major reason for corporate concentration of ownership and the massive foreign presence of capital has been state policy, by which corporations are encouraged to use their profits to buy one another out; to that end the state is prepared to pay half the costs through corporate tax "kickbacks", a practice which speaks volumes for Canadian anti-combines law (Clark, 1984:223; Kierans, 1976:202-203).

Historically the state has worked with and not against corporate capital, whose long-term interests are guaranteed by specific sectors of the state apparatus such as the Departments of Finance, Energy and Mines, and Industry, Trade and Commerce (Clark, 1984:206; Mahon, 1977:167; Marchak, 1979:55). Not surprisingly, then, Canadian political, bureaucratic and economic elites constitute "a penumbral area of power" justifying, in Panitch's view (1977:13), the term "ruling class".

Despite the massive state presence in the production process it cannot be said that the state in any literal sense directs the Canadian economy (Marchak, 1975:35-36). Nor is it considered competent to do so (Taylor, 1984:34). The state's role has always been one of mediation between foreign and indigenous capital (within a continentalist framework) who for most of this century have cooperated in an unequal alliance favourable to the former (Stevenson, 1983:116; Watkins, 1977:2).[4] The high level of foreign ownership in manufacturing and the extraction industries constitutes a "capital drain" contributory to Canada's balance of payments problems (Chorney and Hanson, 1980:74; Clark, 1984:203-204; Stevenson, 1983:164). While pouring billions of public dollars into capital accumulation, the state has no guarantee that its policy goals, such as job creation, will be realized:

> "Working within the framework of the assumptions of corporate capitalism and in the economic environment of multinational corporations, the state is not in a position to establish national goals and insure that they will be followed. Indeed, it appears the

> alliance between government and business is not an alliance of equals but one dominated by the interests of corporate capitalism" (Clement, 1975:350).

The most significant development in the Canadian state structure in this century has been the rise to power of the provinces to a position of relative autonomy within federalism. This event was hastened by Ottawa's granting control over resources to the prairie provinces in 1930[5] and the international demand for those resources since. The Canadian state became a federation of eleven power centres of varying magnitude (Olsen, 1980:11), and the share of revenues received and the proportion of national income spent by the provinces are ample testimony to that. This process has aggravated the federal government's problems in attempting to coordinate economic policy.

Panitch (1977:10-11) sees federal-provincial power sharing as: a reflection of regional class structures, racial, geographical and historical factors, and a consequence of a metropolis-hinterland relationship within Canada and between this country and the United States.

Ontario represents manufacturing interests while the provinces outside central Canada speak for the natural resource extraction industries, which is to say, for the most part foreign capital (Olsen, 1980:100; Stevenson, 1977:77; Watkins, 1977:8).

Provincial power is enhanced further by the fact that resources have always received priority from the state over manufacturing,[6] a strategy that automatically consigned Canada to the status of a dependent economy (Watkins, 1977:9).

Regional specialization and the championing of local and foreign capital by provincial governments have resulted in a "balkanization" of the Canadian economy, allowing foreign capital to play off one region of the country against another and all regions against Ottawa (Watkins, 1977:9; Whitaker, 1977:63-64). The cost of this process is a "north-south" axis and the inexorable integration of Canadian economic life into a continentalist framework.

The state which has evolved in such circumstances is a "complex, many-layered and multidimensional phenomenon" lacking central direction (Whitaker, 1977:63). As capital centres rose in Vancouver, Calgary and Toronto, regional fractions of the bourgeoisie found they could dispense with much of Ottawa's leadership, looking instead to provincial governments to represent them (Stevenson, 1977:79; Whitaker, 1977:64). At the political level this has encouraged provincial leaders to carve out their own power bases through policies of "province-building" (Olsen, 1980: 100; Pratt, 1977). In place of a political national bourgeoisie Canada has a plethora of regional and sectoral interests mediated by Ottawa, by which the federal government can force concessions upon any fraction of the bourgeoisie in the interests of the class as a whole (Mahon, 1977:169).

> "In other words, the Canadian state is a structure or system of institutional and power relationships within which class and group interests establish the compromises required to perpetuate the capitalist order in Canada" (Traves, 1979:167).

Clark (1984) feels that "the rise of the provinces and decentralization of the state" argument has been overstated:

> "Such arguments ignore, I suggest, the fact that the general rules of capital's access are determined federally, that multinationals are at an advantage in dealing with either level of state, and that provinces have not historically refused continental strategies for developing resources" (pp. 206-207).

Within the bourgeoisie the financial elite are dominant, from whose purview (and those of transportation, utilities and the media) foreign capital has been excluded. From this secure base the financial elite are able to enter into their alliance with foreign capital, facilitating the latter's takeover of resources and manufacturing (Clement, 1975:32). In effect the indigenous bourgeoisie has been excluded from the accumulation process (Watkins, 1977:14).

A consequence of the decentralization of the state and a fractioned bourgeoisie has been a high level of conflict within federalism (Traves, 1979:156-157). Conflict between state levels are genuine but not seriously disruptive of relationships within the state elite. Agreements can be reached in private, as was apparent in the energy disputes of the 1970's (Olsen, 1980:93-96) and more recently the constitutional negotiations. At such times "pluralism" is found to be finely delimited. Elites consult one another and only "acceptable" views are seriously considered; the structure of representation is an unequal one in the Canadian social democracy (Mahon, 1977; Olsen, 1980:116-117; Taylor, 1984:7; Trebilcock, 1976:369-370).

Despite the variety of inter-governmental committees, conferences and consultative mechanisms by which Ottawa seeks provincial approval for federal policy, conflict has intensified in recent years. The importance of unity of the bourgeoisie and their state representatives is vital and may take years to achieve, as appears to have been the case for the wage and price controls program instituted in 1975. Much of the delay was due to business skepticism (Olsen, 1980:102-116).[7] In times of crisis the Canadian state and the bourgeoisie have shown an ability to close ranks and consultation forums have evolved to that end (Clement, 1975:364; Panitch, 1977:11).

The Canadian State as Economic Regulator

In the previous chapter it was noted that the democratization of the liberal state brings with it an interventionary role in social (Offe, 1984:152-153) and economic matters (Jessop, 1982:171; Traves, 1979:166). The economic regulatory role is the sine qua non of advanced capitalism and therefore the state apparatus provided to that end merits attention.

The regulatory process and regulatory agencies are central to economic policy and "are intrinsic parts of the modern pluralistic political policy process" (Brown-John, 1981:228). Involving some of the most important functions of government, they have necessitated a major reordering of Canada's parliamentary system in order to accommodate them (Schultz, 1977:334). Regulation is a "halfway house" between state ownership and unrestricted competition (p. 336), "at best an imperfect substitute for competition" (Kaiser, 1979: 34).

> "By economic regulation we mean government intervention by regulatory instruments into those areas traditionally reserved in a market economy for private economic decision makers - the owners and managers of firms and industries ..." (Schultz, 1977:335).

The Canadian state has played a prominent interventionary role for a variety of historical and political reasons. Possessed of a vast territory difficult and costly to develop and a population sparse in relation to land mass, government intervention was essential both for economic processing of resources and in order to ensure that a Canadian nation emerged at all in proximity to the north-south cultural and economic "pull" of the United States. The economy which emerged, buffered by high tariffs, subsidies and other state initiatives was in many ways "a highly artificial one". A hyperactive interventionary state was imperative for the creation and sustenance of a nation "in defiance of economics". In Canada regulatory processes have often been precipitated for social and political reasons rather than as a consequence of strictly economic considerations (Royal Commission on Corporate Concentration, 1978:397-398).

The regulated society in Canada dates from World War I (Traves, 1979:7). Until that time state interventionary policies were conducted by regular government departments, after which technological changes in fields such as transportation and communications (and changing public attitudes to state intervention: Moscovitch and Drover, 1987:27) expanded the state's regulatory role and required that extra-departmental regulatory bodies be set up to perform a specialized adjudicative and law making role. In most cases these "structural heretics" (Hodgetts, 1973:138) took the form of commissions or boards, the first of which can be traced back to the Board of Railway Commissioners of 1903 (p. 144). The traditional administrative structure was unequal to the task of decision making in highly technical fields within an economy that was not only expanding but changing in nature (pp. 141, 155). The new structural forms afforded the flexibility essential for an innovative and experimental policy of regulation and gave the regulatory function the appearance of being wholly or partly independent of the political arena (Schultz, 1977: 336). The new format also allowed for concealment of the expansion of government bureaucracy (Silcox, 1973:117). By the end of the 1970's there were 600 regulatory boards at provincial and federal level, over 100 of which were federal (Olsen, 1980:9; Schultz, 1977:334).

The creation of ostensibly independent or semi-independent regulatory boards and commissions with adjudicative and legislative (policy making) powers involves delegation of power from Parliament. The Special Committee on Statutory Instruments (MacGuigan Committee) reported in 1969 that Parliament delegated law making powers because of lack of parliamentary time and specialized knowledge, the necessity for rapid decisions, flexibility (discretion) in the application of regulatory laws and a need to experiment with legislation (Kernaghan and Willms, 1971:408). The Committee found that of 601 acts examined, 420 provided for delegated legislation (Doern, 1974:20). The Committee defined a regulation as:

> "... a rule of conduct enacted by a regulation making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons; it does not matter if this rule of conduct is called an order, a decree, an ordinance, a rule or a regulation" (p. 15).

The delegation of decision making power to regulatory commissions and boards reflects the broader shift of power from Parliament to cabinet and sub-cabinet levels[8] (Hehner, 1979:108). Two-thirds of federal statutes in force in 1980 delegated powers, while only half did so in the 1930's (Olsen, 1980:7).

Brown-John (1981:194-195) suggests another reason for delegation is "to protect the minister and ... the collective bureaucratic posterior ..." (p. 194) by removing policy making in specific matters from the political sphere and giving it to an independent regulatory agency.

Regulation grew out of wartime conditions when the economy and society was restructured to prosecute World War I (Traves, 1979:7). Regulation was reluctantly accepted by manufacturers as the price for political stability in the unsettled social conditions of the immediate post-war years (pp. 158-162). Since the state was now itself an entrepreneur (beginning with the establishment of Canadian National in 1919) the state also regulated itself (Doern, 1979:161). The use of outright state ownership has in fact declined since the 1950's, joint ventures with private capital being preferred (Olsen, 1980:7). A major exception has been the creation of Petro-Canada in 1975, prompted by concerns about foreign ownership of the energy sector and security of oil supply. Creating a state owned oil company constituted a more direct way of regulating the industry and increasing Canadian ownership. Otherwise regulation has been used as a substitute for state ownership (p. 9), giving the lie to the myth of a laissez-faire period in Canadian economic history.

> "The fact is that the sturdy pioneer has always leaned heavily on the government, whether for land grants, roads, canals, or railways. The price of cementing and expanding the Canadian union has constantly necessitated a state involvement in settlement, transportation and communication" (Hodgetts, 1973:149).

The fundamental justification for economic regulation as given by the state is the need to control and prevent the improper allocation of resources caused by: (1) "excessive competition" (when as a result of ease of market entry basic services are interrupted or unnecessarily duplicated), (2) "natural monopoly" (when, because of economies of scale, production or distribution or because the essential nature of the service demands a monopoly for reasons of economy and efficiency, as in the case, for example, of telephones), (3) to prevent abuse of a monopoly position; the state intervenes to prevent the charging of monopoly prices and to increase output beyond that which would be the case for an unregulated monopoly. New technology may be precluded if new firms cannot enter and those already in may forego cost-saving innovations (Doern, 1974:164, 167; Royal Commission on Corporate Concentration, 1978:396-397).

Some economic sectors, such as transportation and the media, may be considered too important to be left in private hands; in some instances costs will be unacceptable in relation to the size of the market (p. 397). Every regulation is an act of state coercion for the benefit of some interests over others; indeed the very existence of regulation can be explained by the ability of some interest groups to organize and win state power for their own advantage (Waverman, 1979:380). Much of the time the true rationale may be protection of the producers not the consumers (Kaiser, 1979:348). In a survey of regulated interests and "intervenors" (public interest groups) at hearings before regulatory agencies Brown-John (1981:170) found that regulated parties were much more satisfied with the hearing process than were intervenors.

Among the aspects of economic life regulated by the state are access to markets, prices, rate of return on investment, market share, technology, ownership and health and safety. More general regulations refer to the acquisition of capital, labour relations and competition (Doern, 1979:162). Less successful are state strategies to encourage corporate conformity over and above minimum regulatory stipulations:

> "Perhaps the best illustration of this in the current Canadian context is in the field of anti-combines and/or competition policy. As the current debate illustrates, it is one thing to have a regulatory authority prevent abuses of commercial activity; it is another thing to accord the same authority the positive power to encourage industrial reorganization and mergers on the grounds of some broad and vague set of economic criteria" (Doern, 1974:16).

Regulation is only one of a number of options open to the state in attempting to attain policy goals. Other means are found in adjudication, expenditures, consultation, advice[9] and research (Doern, 1979;180-181). Regulation is at one pole with exhortatory statements at the other, and expenditures (grants, subsidies and transfer payments) between the two. Basically the powers of regulatory authorities are adjudicative (the power to rule on applications for licences, routes, tariffs, standards of service and so on) and legislative (the authority to make policy by means of regulation-making powers, though in fact policy may emerge from either function: Schultz, 1977:338).

Regulation is increasingly being handled by independent tribunals (Hodgetts, 1973:155). This is significant in that it "constitutes a fundamental breach of the principles of political accountability and responsibility in the Canadian political system" (Schultz, 1977:342), involving as it does a transfer of power from Parliament and the cabinet to independent authorities. In the opinion of the Royal Commission on Corporate Concentration (1978:400) this should be "a source of concern under a parliamentary system". Officially such bodies exist only to carry out government policy but in reality the potential for policy making is great because of the ambiguity of most statutes (p. 339). This translates into broad discretion for regulators in areas involving political issues without political accountability. For some authorities such as the Canadian Transport Commission and the National Energy

Board, there is no provision for ministerial directives. The Canadian Radio-Television and Telecommunications Commission has guidelines but they are extremely broad, allowing for expansive interpretation (p. 341).

Statutes typically offer only the broadest hint as to their intent. In the absence of more detailed directives, regulators flesh out the statutory language, in the process often redefining significant words (Hehner, 1979:111). The consequence may be a regulatory philosophy and implementation policy at variance with Parliament's wishes.[10] Stanley Knowles, the veteran New Democratic Party Member of Parliament, has expressed the parliamentarian's frustrations:

> "It is our experience in Parliament time and time again to think we knew what we passed when we gave final approval to a piece of legislation, only to find months later that things were being done or restrictions were being imposed of a kind we did not believe appeared in the bill at all" (Hehner, 1979:112).

Under the Consumer Packaging and Labelling Act, for example, power to exempt goods is delegated to the Cabinet but labelling requirements are prescribed by regulations:

> "Thus in passing the Act, Parliament prohibited the sale or import of goods not packaged in compliance with regulations that had not yet been made and were therefore unknown to Parliament. Similarly, the Act delegates the power of entry without warrant and the seizure of goods at the sole discretion of inspectors in order to enforce regulations made under the Act and therefore unknown to Parliament when the Act was passed" (p. 110).

In the case of the Clean Air Act air quality objectives are the responsibility of the Cabinet but what are "air contaminants" are left to be prescribed by regulation. Who comes under the jurisdiction of the Act, who is exempt and what the actual standards are is left to the Minister. Discretionary enforcement is the purview of the inspectors at field level who act upon what they "reasonably believe" to be the case or "deem necessary" (Hehner, 1979:111). Policy may be made at this level also, for inspectors often have a considerable degree of independence, evolve their own methods of handling cases and can shape the final outcome by the wording of reports (Cotterrell, 1984:278-279; Lynxwiler et al., 1984:154-160). Discretion is such an integral component of the regulatory process that day to day decision making cannot be understood without it (Doern, 1979:171), and the trend is toward greater discretion; the Statutory Instruments Act "to provide for the examination, publication and scrutiny of regulations and other statutory instruments", itself stipulates that some types of regulation need not be examined, published or scrutinized (Hehner, 1979:110-111). Many Cabinet, ministerial and administrative decisions in fact are not published and remain unknown to persons affected by them (p. 112). Some balance, however, has to be maintained in any discussion of discretion since it is to some extent an inevitable outcome of the legislative and enforcement process, given the sheer volume and complexity of regulatory laws.

> "The regulation-making mandates and compliance processes, as they are now legally enshrined, confer enormous discretionary powers on regulatory authorities. Discretion exists, in many instances, in the determination of which values will be maximized, how open the regulatory process will be, who will be consulted, how early in the process particular groups will be

> consulted, whether reports and the results of monitoring will be released (and if so, to which parties), whether sanctions will be applied, the type of sanction and the sequence in which multiple sanctions are to be applied, and a host of other related questions.
>
> Discretion itself is clearly not an evil. A great deal obviously depends upon how it is exercised and how openly it is exercised. The more uncertainty that exists in the process, however, and the more closed the process, the more affected groups will likely (and accurately) perceive themselves to be the objects of arbitrary power" (Doern, 1979:173).

The independence of regulatory authorities is always qualified by the principle of ministerial responsibility and the cabinet system of government (p. 161). There are three types of regulatory authority: the Cabinet, ministers and independent or semi-independent agencies.[11] The Cabinet is the primary regulator but the work load has ineluctably shifted to ministers whose departments issue directives not normally referred to as regulations. While most regulations are attributable to politically accountable sources, in some matters it was considered advisable to institute regulatory authorities free of political pressures and patronage appointments, which are often the case for semi-independent agencies (Silcox, 1973:119). In the broader sense of "politics" (accountability to the elected) all regulatory decisions should be answered for at the level of elected officials (Doern, 1974:21).

Semi-independent status has little reality in fact when the political credibility of the government is at stake because of its decisions. Agencies are independent "in most respects except when their decisions or activities cause political problems for ministers and bureaucrats". Decisions can be appealed to the Cabinet (Brown-John, 1981: 195). Formal status, then, is a poor guide as to who is ultimately responsible for regulatory initiatives (Silcox, 1973:118). The Minister (who is likely to be dominated by senior bureaucrats) sets the agenda, policy, budget and procedural rules for the agency under his jurisdiction. He appoints board members and answers for their actions in Parliament. Theoretically Parliament is supposed to invigilate, question the Minister and debate annual reports. In reality none of these suppositions can be assumed to be operable. Board or commission members can be removed by the politicians who appointed them and some are in any case supporters of the government (Brown-John, 1981:195). Legislatures are not equipped nor well enough informed to keep track of what a myriad of regulatory tribunals, commissions, boards and government departments are doing (Silcox, 1973:121).

"Depoliticizing" regulatory authorities has had the effect of removing their work from public view. Since the nature of regulation encourages conflict between interest groups attempting to influence the regulatory process from the field level up, it is important that the public is aware of how decisions are arrived at and why, and what the exact relationship is between the agency and the political executive (p. 122).

> "Independent regulatory units in many instances have been created to "depoliticize" their role or to take the politics out of regulation. The logic of Canadian

> constitutional government and of most recent reform proposals strongly suggests that there ought to be a "repoliticizing" of their role in the sense of increasing their exposure to the influence of elected responsible politicians and to the so-called public interest. The wider and fuzzier the regulatory mandate, the more politics is likely to enter the equation" (Doern, 1974:22).

An instance of "repoliticizing" decision-making occurred during the debate on the Competition Bill in the early 1970's when business strongly objected to the powers envisaged for the Competition Tribunal, one of whose responsibilities would be to review large-scale merger proposals. Contrary to normal practice the government reversed announced policy in the face of severe pressure (Brown-John, 1981:197) and placed the final decision with the Minister of Consumer and Corporate Affairs. On the other hand, when political involvement is regarded as excessive, as in the 1956 gas pipeline debate, the solution is likely to be seen as an independent regulator (Doern, 1974:22).

> "There is a need to ensure impartiality and objectivity, insofar as the regulatory adjudicative functions are involved, and there can be no serious challenge to the position. The problem is that the adjudicative function may give regulatory bodies a powerful defence against political intervention in the regulatory process not only where such intervention is unacceptable but also where it is desirable and necessary. Independence then must be balanced with responsiveness and accountability" (Schultz, 1977:342-343).

In Schultz's view regulators should not have more independence on non-technical matters than is consistent with democratic government. Independent policy making should be at a minimum and clear and binding policy directives should be issued to them (p. 343).

Among the factors influencing agency behaviour are the scope of legislative mandates (the more specific the better); the variety of functions and degree of compatibility between them; the provision for political intervention; the extent to which the agency is dependent on the regulated industry for information, personnel and other matters; the forms of pressure the regulators are subject to and from what sources (industry, state enterprise, provincial governments, public interest groups and the media) (Doern, 1979:180-181).

Who are the regulators also makes a difference:

> "The background characteristics of regulators and the behaviours of regulators are not the same thing but the former can influence the latter. Knowledge of regulators also assists in evaluating how formally representative a particular board, or boards collectively, might be. Data on career patterns might also alert us to the probabilities that boards are, or are likely to become, captives of the interests they are intended to regulate" (p. 180).

The quality and representativeness of personnel has been criticized for such bodies as the National Energy Board (Doern, 1974:29). In fact qualifications for the job are only one consideration for employment and "an inner circle of high trusted intimates of the existing elite seems to have an enormous advantage over other possible competitors" (Olsen, 1980:77). Big capital does not object to regulation on principle, indeed it craves it, but corporate power is attentive to how it is carried out and by whom (Clement, 1977:238) and will oppose the appointment and reappointment of "unfriendly" regulators (Bernstein, 1955:98).

Regulatory personnel have included supporters of the government (as patronage appointments), representatives of regulated interests, career civil servants and former members of Parliament and the legislatures (Brown-John, 1981:202-203).

The Theoretical Approach to the State

In light of the foregoing discussion of the Canadian state, how do the pluralistic and Marxian models fare when applied to the Canadian case? The immediate impression is that neither perspective is ideally suited but that the pluralist view is particularly inapplicable given its maxims of national sovereignty, government-by-majority, formulation of law by consensus and social mobility. The history of the Canadian state is characterized by the rule of successive elites and a close state-corporate partnership in the name of rapid accumulation, against a background of neo-colonialism and continentalism. Against this the legitimation function evolved almost as an historical afterthought. The social order which evolved was one allowing a degree of social mobility in its nether regions but with increasing rigidity at the level of the economic elite (Clement, 1975:xxiv).

> "At the same time, the Marxist framework, while accounting for many of the features of economic society that are omitted in the liberal explanation, fails at the popular level to account for the affluence, skill differentiation, ranks of authority, and independent decisions by a judiciary or independent actions by academics and journalists: in short, fails to account for the persistence of a working class that is not impoverished

> and degraded. Above all, it does not provide the approval for this class, nor a ready rationale for its actions. It brushes aside the differences between this class and those workers and the unemployed who are at the bottom of the ladder; it ridicules the integrity of this class when it attempts reforms; it refuses to recognize the claims of such workers on their employers and on governments" (Marchak, 1975:102).

Marchak's portrayal of Marxists and Marxism seems over generalized. Not all Marxists, for example, see reforms that alleviate working-class conditions as valueless: it was certainly not true of Marx himself.

The Marxian models, while of European derivation, can be applied to the Canadian context, "yet there has been almost no concerted application of a political economy model to problems of social control (i.e. legitimation and coercion) in Canada" (Ratner, 1985:24). Conflict-oriented criminologists have recognized the need for the construction of state theory in Canada and this theoretical vacuum is most readily appreciated when the subject of inquiry is "corporate crime and penal policy" (Ratner, 1986:36).

The Marxian model does contribute to an understanding of Canada's satellite status, past and present, her dependent economy and the metropolis-hinterland relationship which prevails between Canada and the United States. It also explains more fully the many undemocratic aspects of Canadian social life and the authoritarian tendencies that have surfaced at periodic intervals whenever liberal democracy seems unable to guarantee the status quo (Moscovitch and Drover, 1987:27). Finally, it is better able than pluralism to account for the later arrival of social welfare and union recognition in Canada. All in all, a Marxian perspective (embracing both instrumental and structural elements) would appear to provide a better empirical fit as a methodological approach to Canadian society and the state.

Summary

If indeed a Marxian approach to the Canadian state is more helpful, what can be extracted from the preceding discussion for the purpose of this study? Anything of value that is said of the capitalist state must be empirical and historical in nature. The "state in general" exists nowhere. In order to comprehend the Canadian state in the 1980's we must know how it evolved to its present condition.

An empirical approach minimizes the dangers of teleological-functional pronouncements à la Poulantzas. The form any capitalist state takes will vary from one historical period to another and is therefore a matter for empirical investigation. Nor can state policy be predicted. In the area of competition law, for example, while virtually every advanced capitalist system has legislation, how the law is implemented over time depends on a multitude of political, economic and cultural factors within each society, only ascertainable by empirical study. How the state will respond to any crisis is unknowable beforehand, for there is no omniscient grand stragegy, no carefully laid plan for the accomplishment of the dual (and conflicting) objectives of capital accumulation and legitimation.

One response to structural contradictions is criminal law (Comack, 1983:16) which emerges as a "solution" to problems proffered by groups whose actions threaten to disrupt social relations of production and, hence, accumulation (p. 19). Legislation legitimizes those relations by articulating the interests of disaffected groups (p. 13). Smandych (1985:96) has suggested the first combines legislation was primarily intended as a "solution" to disruptive capital-labour relations of the late 1880's. How much of state resources are given respectively to accumulation and legitimation will involve a "trade-off" process (Moscovitch and Drover, 1987:18) and will vary from one state system to another, according to historical precedent and contingency requirements. In the Canadian case, as has been seen, accumulation has always had a clear priority over legitimation.

Since capitalism has no grand plan for the future, a Marxian approach to the capitalist state must allow for failure, even egregious miscalculation by state managers. The Canadian state is ponderously present in the accumulation process, and for this reason crises of accumulation imply crises of legitimation.

Far from reflecting a blueprint for remedial action, a Marxian approach regards state policies as diffident, tentative and experimental attempts to solve social, economic and political problems, a groping in the dark for "solutions" which serve only to disclose further contradictions and unintended consequences. Herein lies the merit of a Marxian dialectical approach.

The options open to state managers are delimited by the structural constraints of advanced capitalism. Nonetheless some degree of flexibility is available, including major concessions to subordinate classes over the objections of fractions of the dominant class. Again, what is conceded and for how long cannot be deduced a priori, but will depend, within the structural matrix, upon the alignment of classes at that time.

What can be said, then, of the monopoly capitalist state at the level of generality, before empirical exigencies intrude? Such a state is centrally placed in the production process and assists capital with a variety of historically evolved strategies. In doing so the state possesses a (empirically determinable) degree of autonomy from all social classes and fractions and is capable of acting in defiance of all of them. The actual mechanisms that make such autonomy possible and maintain it are matters for empirical inquiry.

An appreciation of state manoeuvrings requires both acknowledgement of the motivation of state managers and the "objective relation" between the political and eocnomic levels, within which managerial choices are made. In a Marxian approach the political is never seen as "autonomous" from the economic, but neither is it epiphenomenal. Instead, the two are invariably seen as inextricably interconnected.

Since the economic is characterized by class domination, the state's link to the class structure must be demonstrated, especially its relations with the dominant class.

The state does not direct the economy in the sense of stipulating what is to be produced, in what quantity and at what price; the means of production remain in capitalist hands. Rather the state oversees capitalist production and furnishes the social and economic conditions conducive to that end, even to the extent of entering as a producer in carefully demarcated areas consigned to it by the bourgeoisie.

The importance of an historical and empirical approach to the capitalist state is immediately apparent from a cursory examination of the Canadian instance. Many of the features of the Canadian state system make it uncharacteristic, even unique in some respects among advanced capitalist systems.

Ostensibly a sovereign state with an advanced capitalist economy, this country in fact exhibits many features of a colonial state. Canada manifests a hinterland status with an economy dependent upon American economic performance and goodwill; an "advanced" capitalist system whose natural resource and manufacturing base are controlled by others, a capitalist system possessing a bourgeoisie fractioned by regionalism, sectoral rivalries and foreign ownership, whose hegemonic elite based on finance is content to play a mediatory role assisting in the subordination of Canadian economic affairs to a continental set of priorities; a decentralized state riven with conflict, presiding over an economy bereft of a laissez-faire period.

Geographical vastness, a sparse population, natural resource abundance and the proximity of capitalism's most powerful economy made it unlikely that Canada would ever achieve full political and economic development, but would instead transfer from one imperial master to another. This quandary has proven acceptable to Canada's hegemonic elite, currently advancing economic continentalism under the rubric of "free trade". For these reasons Canada cannot be considered an advanced capitalist society in the fullest sense; instead she is occupying a place somewhere between outright colonialism and full political and economic sovereignty.

The evolution and present status of combines legislation must therefore be seen in the context of Canadain political and economic history, a chronicle of state-bourgeoisie symbiosis, oligopolization and creeping continentalism. With this as background we now undertake a comparative survey of regulatory policies, specifically with regard to merger and monopoly in advanced capitalist systems, before recounting the history of Canadian combines legislation and enforcement and the contribution of "new criminologists" and other critics to an understanding of patterns of enforcement.

FOOTNOTES

1 Clark (1984:206) is of the view that the personal relations between the state and economic elites (and the career "traffic" between the two sectors) are "so close as to reflect a direct translation of the general interest of the economic elite into state policy".

2 Chorney and Hanson (1980:66) see a declining need for the Canadian state to justify its practices on behalf of capital, largely because of a political culture strongly supportive of liberal democracy and capitalism (Chorney and Hanson, 1980:88-89; Taylor, 1984:33). The survival of capitalism through various economic crises can only be explained in terms of the political culture of specific capitalist societies. The Canadian political culture is one in which radicalism and class consciousness have been stifled so that expressions such as "class struggle" and even "working-class" appear anachronistic (p. 68), in which conflict has been shifted from the economic level to the margins of political practice whose centre is governed by a weighty consensus (p. 85). This allows the state to cater to the interests of (largely foreign owned) monopoly capital at the expense of other classes (p. 66).

3 While crown corporations tend to be found in high-risk, low-return sectors (such as transportation) it is not invariably so, as the instance of Petro-Canada shows. On the other hand, the private sector continues to function in such precarious (albeit highly protected) industries as footwear and textiles (Niosi, 1981:92-93).

4 Clement does not see the alliance between Canadian and foreign capital as an unequal one favouring the latter. He argues that indigenous capital is able to function on a basis of strength from its preserves of finance, the media, transportation and utilities (Clement, 1975: 32, 33).

5 In 1930 section 109 of the British North America Act was amended "to extend provincial ownership of crown lands and resources within its respective borders to each of the four western provinces" (Richards and Pratt, 1979:284), all of which had come into existence since 1867.

6 The inferior status of manufacturing is reflected in the hierarchical structure of the Canadian state apparatus at the federal level. Manufacturing did not even have departmental status until after 1945 but remained subordinate "to the dominant departments associated with the interests of the hegemonic fraction

and the large exporters" (Mahon, 1977:182). When incorporated into the Department of Industry, Trade and Commerce manufacturing once again took on an inferior status within the Department. Within the state appartus as a whole the Department of Finance is supreme and approves all departmental programs (p. 175).

7 Business need not have been so apprehensive. The object of the controls implemented in 1975 "clearly was to reduce wage compensation and prevent the fall in profits which normally accompanies a recovery by wages during the course of the business cycle" and was successful in that regard, "holding down wages by 7.7 per cent while prices fell by only two percentage points" (Chorney and Hanson, 1980:74). The controls transferred income from labour to capital, lowered labour's expectations, raised unemployment (three percentage points higher in 1978 than in 1974 when it stood at 5.4 per cent) and thereby facilitated accumulation in the hope that the private sector would then be motivated to embark on a new investment cycle (pp. 74, 76).

8 Successful lobbyists have long recognized the declining power status of Parliament, and concentrate their efforts on cabinet and especially the middle and upper levels of the bureaucracy at the policy formulation stage. By the time the bill reaches Parliament the battle is usually won and lost; second reading of the bill represents approval in principle of all major matters in the proposed legislation and is unlikely to be changed before standing committees. The most successful lobbying efforts are those the public remains unaware of, such as the Canadian Chamber of Commerce and Canadian Manufacturers Association's annual briefs to the cabinet, annual interviews with ministers and deputy ministers and direct but informal contacts with various bureaucratic strata. The Canadian Manufacturers' Association, which has an annual budget of $1 million, pays particular concern to matters pertaining to proposals for implementation of regulations concerning restrictive trade practices, monopolies, combines and mergers. Interlocking membership of bureaucracies (including regulatory bodies) and interest groups, and between the latter and ministers, are extremely advantageous; both C.M. Drury and Mitchell Sharp were members of the Canadian Manufacturers' Association on entering Cabinet in the 1960's (Van Loon and Whittington, 1976:292-302).

9 Cotterell (1984:275) sees advice-giving to business as a prestige-conferring activity for regulators arising from a desire for enhanced professionalism

and mutual deference between regulator and regulated.

10 The Special Committee on Statutory Instruments enumerated the problems as: vagueness as to legislative scope of regulations, sweeping statutory language, absence of public debate, inadequate consultation with interested parties, imprecision as to form and content of regulations, and inadequate parliamentary control (Kernaghan and Willms, 1971: 409).

11 Schultz (1977:341) names the Canadian Transport Commission and the Canadian Radio-Television and Telecommunications Commission as independent bodies; semi-independent bodies include Canadian National Railway and Air Canada (Silcox, 1973:117).

IV. COMBINES OFFENCES AND THE REGULATORY STATE: A COMPARATIVE AND HISTORICAL INTRODUCTION

Introduction

The purpose of this chapter is to examine the role and developmental history of the Canadian state precisely in its combines regulatory function, and the extent to which the "new criminology" has accounted for it theoretically.

No interventionary policy can be studied in isolation from those of other regulatory states in the sphere of international capitalism and, therefore, as preliminary to this undertaking a brief comparative survey of advanced capitalist regulatory policies is presented. This serves as background for the next section which looks at the legislative and enforcement history of Canada's Combines Investigation Act up to the period under analysis.

Comparative Regulatory Policy

No specific regulatory policy can be examined in isolation from, but only in the context of, other nation states, policies and practices. Capitalism in the latter half of this century is essentially international in operation, and the vehicle for this transcendence of national boundaries is the global corporation. Thus international comparisons are imperative in arriving at generalizations concerning the attitude of advanced capitalist states toward corporate capital, their willingness to intervene as regulators and in what circumstances.[1]

An important consideration here will be the extent to which regulatory states influence one anothers' policies (Reasons and Goff, 1980:137).

A cursory examination of state monopoly capitalist societies[2] shows a legislative concern with cartels, mergers and monopolies as the principal threats to the moderate level of competition characteristic of advanced capitalism. Nowhere are such phenomena prohibited per se. Industry-wide agreements and high levels of concentrated ownership are endemic. For some of the major capitalist industrial systems concentration of economic resources in private hands has been the direct result of state policy, as in the cases of France and Japan (Kinter and Joelson, 1974:257; Krauland, 1981:306).[3]

Despite universal prohibition of cartels a permissive approach prevails in the form of "exemptions" in which agreements are allowed if shown to be (or can be made to be) economically beneficial in terms of, for example, reduced costs or some other efficiency. In France, for instance, the state "has seldom called for immediate termination of the objectionable restrictions", (Edwards, 1967:347) and such cartels are tolerated for up to two years while negotiations are conducted to render the agreements congruent with policy. In Switzerland agreements are permitted if they serve "to promote an industrial or occupational structure that is desirable in the public interest" by countering "excessive concentration or excessively rapid industrial changes ..." (p. 364). In other national-states such as Mexico and Japan,[4] export considerations are a major concern. Some countries require all approved agreements to be registered, including Britain, Israel, Spain, Sweden[5] and Holland (pp. 352-353, 356, 361, 362, 365).

Turning to the matter of mergers and monopolies, given the tolerance for high levels of concentration official concern tends to focus on "abuse of dominant position" rather than quantitative levels of ownership as such. Within the European Economic Community, for example, Article 86 of the Treaty of Rome "prohibits abuse of a firm's dominant position in a substantial part of the Common Market" (Krauland, 1981:298). In West Germany, a member country, abuse exists "if the market-dominating enterprise acts in a manner that would be impossible if it was exposed to substantial competition", such as demands for price levels and conditions of sale (p. 302). However, positions of dominance are permitted if the overall economic consequences are thought to be sufficiently beneficial as to outweigh the loss of competition. In Austria dominant firms register with a Cartel Tribunal and their performance is monitored (Edwards, 1967:344). Firms are also registered in Norway and Spain (pp. 359, 362). West Germany,[6] Japan and Finland require that large prospective or completed mergers be reported.

The French government took a liberal view of corporate concentration until inflationary concerns led to a strengthening of legislation in 1977.

> "The French Government encouraged mergers through the 1960's and into the 1970's as a simple answer to problems created by the small size of the average French firm in contrast with the large size and innovative practices of U.S. competitors. European 'merger fever' during the 1960's ran highest in France" (Krauland, 1981:306).

The new law introduced penalties of five per cent of turnover for abuse of a position of dominance and firms may be ordered to restore "adequate competition" (p. 306).[7] However, more significantly, "the government has not aggressively enforced these new concentration provisions" (p. 307).

In Japan the Antimonopoly Act of 1947 (the first Japanese antitrust law, imposed by the United States Occupation Authority after Japanese defeat in the Second World War and designed to break up the family-owned conglomerates thought to have been responsible for Japanese militarism) was strengthened in 1977 after successive amendments weakened the original legislation. As in France, inflation was a causal factor in the revision (Hahn, 1984: 133-134). The Act now follows a "substantial restraint" criterion. Mergers are forbidden "if the effect ... may be substantially to restrain competition or if the acquisition has been effected by unfair business practices" (Kinter and Joelson, 1974:257). Intent to merge requires 30 days notice. However, the powerful business lobby has always exerted tremendous pressure on government for mergers especially when international trade is involved. Their success is seen in the fact that only three mergers have provoked complaints from the Free Trade Commission (p. 257) and none have been prohibited (Krauland, 1981:320). There has always been a disinclination in corporatist Japan to resort to the courts to settle disputes (Hahn, 1984:136). Instead, regulatory conflicts are resolved informally by private negotiation.[8]

In Britain horizontal mergers are only examined if a number of conditions are satisfied, including market control of at least 25 per cent or combined assets of more than five million pounds (Krauland, 1981:310). Large mergers only became a concern in 1965 and until 1948 the state relied entirely on the Criminal Code provisions of conspiracy, monopoly and contract (Reasons and Goff, 1980:130). While the 1973 Fair Trading Act defines a monopoly as any firm supplying 25 per cent or more of the market, the Monopolies and Mergers Commission in 1977 ruled that an actual supplier of more than 50 per cent was not acting against the public interest (Krauland, 1981:309, 312).

These illustrations underline the importance of looking beyond the legal verbiage to actual enforcement practices which must be considered "within the context of the social, political and economic realities of the nation-state" (Reasons and Goff, 1980:136). Perusal of statutory particulars, for example, reveals that proposed mergers may be prohibited and completed mergers may be dissolved in Britain and West Germany (Krauland, 1981:302, 311), but the former is the exception and the latter is almost unknown. In France the state may order the restoration of competition but the reality is that "the law has not been rigorously applied" (p. 305). In Japan no provision has been made for class action suits or treble damages to counter the effect on consumers of cartels and oligopolies in the name of international trade[9] (Hahn, 1984:132-133). Indeed the "history of the Antimonopoly Act ... has been one of government and business hostility and hence shrinking applicability" (Kinter and Joelson, 1974:259), exactly what one would expect in such a tightly interlocked corporatist society. The maximum fine under the Act was increased to just $21,000 (U.S.) in 1977 (Hahn, 1984:134).

Britain, Japan and Spain allow for disgorgement of profits and (in Japan) a surcharge of 1.5 per cent of earnings by illegal cartels (Hirose, 1984:103), and sometimes offenders are actually required to pay.[10] Imprisonment is customarily found in anti-trust laws but rarely used.[11]

Reasons and Goff (1980) conducted a comparative survey of anti-trust law and enforcement in Canada, the United States, Britain and Australia. They concluded the laws were largely symbolic and expressive of a "free enterprise" ideal. Enactment and enforcement coincided with "specific social, political and economic crises and conflict within the respective nation-states" (p. 137). State interests agreed with dominant economic interests. Specific rulings might displease specific capitalist interests in particular socio-economic circumstances but competition law as a whole, for the most part, reflects the long-term interests of capital (pp. 136-138).

In summary it must be concluded that the anti-trust laws of the countries surveyed have rested lightly on the shoulders of the corporate elite. Enforcement falls short of the expressed objectives of the respective legislation whose language is uniformly general in tone; even where quantitative standards such as market shares are given, legislation invariably says only that corrective action "may" be taken. Proceedings are lengthy and tortuous with criminal prosecutions always the means of last resort.[12] Corporate interests are favoured over those of consumers, often in the name of some "national interest" or beneficial consequence for the economy "as a whole".

Major industrial states such as France and West Germany have been loath to deal with large mergers and attitudes to cartels have been equally lax.[13]

It does appear that national policies influence one another in that specific concepts come to be shared; Canada has adopted "abuse of dominant position" and notification of prospective mergers from the European experience (Competition Act, R.S. 1986, C.C-23, S.50, 64(1)(f).

The Canadian State in the International Context

State monopoly capitalism in Canada in the period of this study represents a specific type of historical society with structural features in common with other advanced capitalist societies (not all of which are liberal democracies), yet with facets unique to this country's history.

Advanced capitalist societies share a number of conditions such as a rationale for economic production in terms of oligopolistic efficiencies of scale, planning, pricing and "market stability"; the partial exclusion of the state from the organization of production while capitalizing it and setting broad policy goals; a dependence on accumulation as the fiscal source and, in liberal democracies, the circumvention of state power by the democratic process (Offe, 1984:120-121). Nevertheless, the monopoly capitalist state possesses an empirically determinable degree of autonomy from all social classes despite the fact that the means of production largely remain in private ownership.

Within this ideal type Canada is in some respects atypical of state monopoly capitalist systems in that it had only a brief national development phase sandwiched between "imperialisms". Growth has been monopolistic and state sponsored by means of fiscal and monetary policies, grants, subsidies, and the provision of infrastructure (Panitch, 1977:14). The state has also intervened as a direct producer in the form of crown corporations, development corporations and "joint ventures" with the private sector (Clement, 1975:102; Marchak, 1979:55; Olsen, 1980: 6-7). The hegemonic elite has been pleased to reserve finance as its entrepreneurial base and to act as mediators in leasing a rich resource base to foreign capital. High levels of corporate concentration and foreign ownership have been the deliberate result of this policy. Another consequence has been that the metropolis-hinterland relationship between central Canada and the rest of the country has become a microcosm of Canada's relationship with the more powerful economy of the United States (Davis, 1971). Canada exhibits the characteristics of late developing capitalism while retaining colonial features at an advanced stage of development. Finally, Canada is structurally atypical of liberal democracies in that it has increasingly become a decentralized state with the political ascent of the provinces as power centres in their own right. Possessing for the most part only regional bourgeoisies, it is increasingly a fragmenting state in conflict with itself.

All state monopoly capitalist systems demand a comprehensive regulatory system but in Canada so pervasive has the state been in accumulation throughout its history that, in the view of some observers, the market becomes a secondary coordinator of production and distribution to that of state entrepreneurship (Chorney and Hanson, 1980:70). Given this developmental history what has been the overall pattern of enforcement of combines law up to the period under analysis?

THE COMBINES INVESTIGATION ACT

The History of Anti-Combines Legislation

Canada's first anti-combines law owed its origins to the protests of small business and labour organizations against the uncompetitive state of the Canadian economy (Goff and Reasons, 1978:41-42; Smandych, 1985). The late

1880's and 1890's "were a time of near universal criticism of unregulated competition" (Bliss, 1973:44). The Dominion Wholesale Grocers' Guild, created in 1884 to form preferential trade agreements with food manufacturers and to "fix prices among all members to terminate any competition", in 1887 fixed sugar prices (Goff and Reasons, 1978:41). Two grocers, supportive of price agreements in general, protested to the courts since sugar constituted 40 per cent of the grocery trade. In going to court the grocers acted from self-interested motives seeking protection from the combine, not for consumers, but for themselves.

At this time trade agreements were widespread in Canada, most of them being entered into in the wake of the MacDonald government's protectionist National Policy of 1879 (Goff and Reasons, 1978:41). Agreements were popular with participants since they cut costs and were seen as essential for a "living profit" (Bliss, 1973:43). The issue was politically explosive, with the Liberal opposition favouring free trade and enjoying the support of the powerful agricultural interest.

In the 1888 parliamentary session a Conservative Member of Parliament, consumer advocate and small businessman Clarke Wallace, proposed a Select Committee to investigate combines. Wallace was appointed chairman and in the next two months investigated, inter alia, the sugar, coal, grocery, barbed wire, coffin manufacturing and undertaking businesses, finding combines in all of them. The Committee issued a tepid report, weakly condemning combines and revealing more concern for non-members of combines than for consumers (Goff and Reasons, 1978:43).

A private member's bill was introduced by Wallace in February 1889: "An Act for the Prevention and Suppression of Combines formed in Restraint of Trade". The government referred the bill to the Committee on Banking and Commerce who, under pressure from business interests which constituted the only effective lobby (Bliss, 1973:43), added the words "unlawfully" and "conspires" to section one of Wallace's draft. The Senate subsequently added "unduly" and "unreasonably" to several subsections.

Offenders now had to "unduly" limit facilities for manufacturing, transporting and so on, "unduly" prevent, limit or lessen manufacturing, "unreasonably" enhance prices, or "unduly" prevent or lessen competition, before they had anything to fear from the new law, which only now received government support and was passed in this form. The bill had always had a low priority with the government and Wallace accepted the legislation in its revised form. Maximum penalties of $1,000 and one year in prison were provided for.

The changes in Wallace's original bill had been made to protect businessmen engaged in "proper and innocent" restraints of trade; businessmen who engaged in combines were not to be regarded as criminals per se. The inclusion of "unlawfully" supposedly referred to common law which did not in fact address combines. Inclusion of "unlawfully", in effect, rendered the law unenforceable.

Enforcement was to be the prerogative of provincial Attorneys-General, who in the ensuing years would display a marked reluctance to prosecute "even the most obvious combines" (Ball, 1934:23). The Act was incorporated into the Criminal Code in 1892. In 1897 import duties could be reduced or removed on goods controlled by combines but this was done only once in the life of the legislation (Stanbury, 1976:575-576).

When the word "unlawfully" was dropped in 1900 a number of prosecutions took place despite the cumbersome enforcement procedure. No permanent enforcement body existed, plaintiffs were responsible for their own legal costs and proceedings could be lengthy and uncertain.

All offences under the Act were misdemeanours and referred only to illegal agreements, saying nothing about the corporate concentration of capital now getting underway in Canada. In the period 1909-1913 a major consolidation movement occurred made possible by a manufacturers' tariff increase in 1907 (Naylor, vol. II, 1975:186), producing such giant firms as Canadian Breweries, Canada Cement and Amalgamated Asbestos (Bliss, 1973:46; Traves, 1979:5) and an industrial structure dependent on the tariff to protect its high prices (Naylor, vol. II, 1975:194).

Bliss (1973:44) regards the 1889 Act as "no more than a political sham" (p. 44).

> "The tortuous use of "unlawfully", "unduly" and "unreasonably" even opened Parliament to ridicule for having declared that a combination could now unlawfully advance prices if it did not do so unduly, and vice-versa" (p. 41).

The process of corporate concentration was apparent from the first decade of the twentieth century. Myers (1972) writing in 1914 noted:

> "The rapid concentration of wealth in Canada is no mere fancy. Already, it is estimated, less than fifty men control $4,000,000,000 or more than one-third of Canada's material wealth as expressed in railways, banks, factories, mines, land and other properties and resources" (p. xxxi).

The 1889 Act displayed policy features which would become familiar in future enactments of anti-combines law. The behaviours in question were not prohibited per se. A distinction was made between "good" combines (the great majority) and "bad" ones; even combines which broke the law were deemed to have been entered into "in good faith". Businessmen as a class were not seen as criminal when pursuing their economic interests. Adverse publicity was thought to be the chief deterrent. For these reasons the law was vague in content and lethargic in enforcement. No combine was broken up by the 1889 Act (Bliss, 1973:45). Business was essentially left alone to conduct its own affairs. Agreements were regarded both by business and government as essential for a working profit. Corporate bigness resulting from mergers was seen as essentially beneficial for the economy (p. 48). The bill offered little protection to consumers; because of the expense of litigation most complaints came from businessmen themselves and from farmers. Judges were presumed competent to assess the economic ramifications of each situation. Finally, drafting the 1889 legislation revealed the ability of the political and business sectors to produce laws which served the purpose of each.

Dissatisfaction with the innocuous 1889 legislation and public protest over rising prices led to a new enactment, the Combines Investigation Act of 1910. In the House of Commons Minister of Labour MacKenzie King, entrusted with passage, made clear the thrust of the law:

> "This legislation is in no way aimed against trusts, combines and mergers as such, but rather only at the possible wrongful use or abuse of their power of which certain of these combinations may be guilty" (Ball, 1934:38).

The legislators contrived an enforcement procedure more cumbersome than its predecessor. Complaints would be received in the form of a Statutory Declaration from six citizens to a judge who would then investigate and hear the response of the businesses concerned and would then decide if it merited further action. If so, the Minister of Labour would set up a three-man ad hoc board composed of representatives of the two sides and a judge as chairman. The board could issue a desist order, to ignore which was an indictable offence punishable by a fine of $1,000 per day. Nothing, however, would be done concerning illicit profits up to that time. The Act was in fact not enforced "while merger after merger was effected" (Naylor, vol. II, 1975:193). The chief weaknesses of the 1910 Act were the prohibitive cost of litigation for private citizens and the absence of a permanent regulatory agency.

The First World War brought sharp price increases and allegations of war profiteering. An Order-in-Council in

1916 prohibited price-gouging, but again it was left to provincial Attorneys-General to surmount their inertia and prosecute. In 1918 town councils were authorized to establish Fair Price Committees and to publish such prices in newspapers (Ball, 1934:52). With the conclusion of the war there were further price increases and unemployment rose. The Laurier and Borden years were a period of social instability and ubiquitous class conflict, culminating in the Winnipeg General Strike of 1919 (Moscovitch and Drover, 1987:20; Traves, 1979:8). Business itself was divided over economic policy (p. 8).

The Borden government responded to the political crisis with the Fair Prices Act of 1919 which replaced the 1910 Act, but also created a permanent enforcement body, the Board of Commerce, set up by an act of the same name. The three-member board had the status of a court of record whose pronouncements were final on matters of combines, monopolies, profiteering and hoarding (Consumer and Corporate Affairs, 1976:207-208). Combines were any agreements, mergers or trusts found by the Board to be or likely to be harmful to the public interest. In its first six months of operation the Board issued 50 desist orders. The Board combined the functions of investigation, laying of information, prosecution, judgement and enforcement and could compel sale at prices it decreed as fair. The powers of the Board were evident to business in January 1920 when it called upon all firms involved in trusts, mergers and agreements to state the purpose and scope of these arrangements and explain why they were not against the public interest (Ball, 1934:57).

The scope of the 1919 legislation is indicative of the state of mind of the Borden government at that time. Once the mood of crisis passed the attitude of government changed and all three board members had resigned by 1920, claiming the legislation was unenforceable.[14] The Board always lacked the manpower it needed and it is clear "the government never intended that the Board should arbitrarily favour consumers over producers" (Traves, 1979:70).

The constitutionality of the legislation was already under attack, and was declared ultra vires in 1921. In the end the 1919 legislation had little effect on Canadian economic affairs.

This ruling removed all anti-combines legislation. MacKenzie King was now Prime Minister and the next venture in anti-combines law making, the 1923 Combines Investigation Act, bore his mark. Once again only "bad" combines, those detrimental to or likely to be detrimental to the public interest, were targeted. Once again publicity would be the main deterrent. A permanent Registrar would investigate matters brought to his attention by the Minister of Labour or six citizens, or he could investigate on his own initiative. Tariffs could be reduced or removed and patents removed from goods involved in combines. Maximum fines of $25,000 for corporations and $10,000 for individuals as well as two-year jail sentences were provided for. The Minister decided whether prosecutions should take place, but it seems many complaints were dismissed by the Registrar (Ball, 1934:68-69).

The 1923 Act contained some improvements over previous legislative efforts. Defunct combines could not be prosecuted (p. 65). Any citizen could now lay an information before the Solicitor General of Canada. Plaintiffs no longer bore the cost of investigations and their identities remained secret (in previous legislation it was arguable as to who was intended to be deterred by publicity). The Registrar's report was publishable within 15 days unless he asked that it be withheld (pp. 67-68).

The legislation was as ineffective as its predecessors (Traves, 1979:81-82). Although mergers were addressed for the first time, 231 mergers are recorded between 1925 and 1930 producing concentrations of ownership in such sectors as lead, ammunition, meat packing, tobacco, pulp and paper, cement and auto manufacturing (Goff and Reasons, 1978:59-60). These industries all earned higher profits than non-concentrated sectors in the ensuing depression. Only 12 reports were issued by the Registrar from over 300 inquiries between 1923 and 1934 (Ball, 1934:70).

The enforcement emphasis under the Bennett government of 1930-1935 was "unfair competition" with chain retailers as the target (Goff and Reasons, 1978:60). No reports on combines were released in the life of the government, which suggests corporate business was left free to restructure the economy as it saw fit during the worst years of the depression.

By 1934 the Bennett government was highly unpopular because of its "hands off" approach to the economic situation and resorted to that "time-honoured, trouble-dodging device" (Radwanski, 1979:68), a royal commission (Royal Commission on Price Spreads). A new Criminal Code section followed, prohibiting discriminatory selling and predatory pricing. No adequate means of enforcement was provided. The Dominion Trade and Industry Act created a three-member Dominion Trade and Industry Commission, entrusted with enforcement of the Combines Investigation Act, which now permitted control of prices and production in all industries if the Commission saw fit. However, the three-man Commission also happened to constitute the Tariff Board, known to have a warm relationship with business (Goff and Reasons, 1978:62).

The Conservatives were removed from office in 1935 and the Commission they created was declared unconstitutional shortly afterward. In 1937 the Liberals restored the Combines Investigation Act to its 1923 status with enforcement in the hands of a single commissioner (p. 63).

Both world wars provided an incentive for combines. During the Second World War all anti-combines activity was suspended. Prices were controlled by the Wartime Prices and Trade Board headed by C.D. Howe. Between 1939 and 1950 the Board "exercised such tight control over the economy the Combines Investigation Act was in virtual eclipse" (Grover, 1979:100). With the end of the war many industries proceeded to fix prices, and in one celebrated instance the Cabinet intervened to block a prosecution, thereby breaking a law they themselves had legislated.

When the combines Commissioner published a report alleging price fixing by the flour milling industry "since at least 1936" (Rosenbluth and Thorburn, 1963:10), the Cabinet refused to make it public, notwithstanding a legal requirement that they should do so within 15 days. Amid political uproar the report was eventually published at the end of 1949 (Newman, 1975:167-168; Rosenbluth and Thorburn, 1963:10-16).

This latest insight into the politics of anti-combines enforcement instituted the MacQuarrie Commission, which studied combines from 1950 to 1952.

During the public hearings a familiar scenario unfolded:

> "Business, agriculture and labour expressed views before the committee. The submissions of business were the most numerous, since many general business organizations, trade associations and even industrial firms submitted briefs; despite their number they all took the same general line" (Rosenbluth and Thorburn, 1963:18).

Business complained of "uncertainty" in enforcement policy (although its recommendations would have made enforcement even more discretionary), unanimously demanding a reduction of the Commissioner's powers and depicting him as "biased" against business.

The MacQuarrie Commission "refrained from any substantial change in the concept or direction of the combines laws" (Consumer and Corporate Affairs, 1976:212), but proceeded to disarm the Commissioner, allowing him to retain investigation and research (as the Director of Investigation and Research) while appraisal of his findings and the report to the Minister were now the prerogative of the new Restrictive Trade Practices Commission. The Director could initiate an investigation but to do so effectively required the consent of one member of the Commission, which would listen to business arguments in the course of hearings.

Nothing was done to strengthen the law on mergers and monopolies, matters crucial to big capital. Courts could order mergers or monopolies dissolved, but this has never been done in practice.

Seven years later the Diefenbaker government produced proposals that would have overhauled the Act, producing "a flood of representations", mostly from business pressing for a further relaxation of the proposed law (Rosenbluth and Thorburn, 1963:88-89).[15]

The bill was withdrawn and reappeared in 1960, when business succeeded in having exports and other permissive clauses excluded from anti-combines legislation. Economists, farmers and consumer groups were critical of the new bill but these non-elite interests "were unsuccessful in having their suggestions adopted by the government" (p. 91). Acquittals in two major cases in 1960 made clear the need to strengthen the merger and monopoly provisions, but opposition amendments to that end were voted down.

Criminal Code sections concerning combines were now transferred to the new Act. Conspiracy, combines, agreements or arrangements were now illegal only if competition could be shown to be lessened in specific areas, making it more difficult to convict even when anti-competitive effects were evident. Four defences for resale price maintenance were introduced, covering most eventualities. Customs duties would not be reduced if the offenders ceased their criminal activities when caught. 7

Modifications to Anti-Combines Law Since 1960

By the 1960's Canada's anti-combines legislation had undergone several revisions and it had become apparent to all neutral parties that the Act as a whole was ineffective (Snider, 1979:111). In 1971 a bill for an entirely new and tougher statute was tabled in the House of Commons and was met with a storm of protest from business, who proceeded once again to comprehensively lobby the political system. As a result the bill was withdrawn and the Minister and his senior advisers replaced (there would be seven ministers between 1972 and 1977:116).

Further legislative proposals were introduced in 1973 and 1977 and were also withdrawn on failing to win corporate consent. By this time all the major proposed improvements in the 1971 bill had been jettisoned and the government had elected to legislate non-controversial (non-threatening to the corporate elite) aspects of the new law while continuing to bargain with the business elite for amendments governing merger, monopoly and conspiracy agreements.

That the political momentum had fully passed to the corporate sector was apparent in the removal in 1981 of the Director of combines prosecutions, Robert Bertrand, a strong advocate of strengthened merger and monopoly provisions (Baetz, 1985:354-355).[16] Bertrand had angered the oil majors by publishing a seven-volume study alleging widespread anti-competitive activities in the industry. By 1981 the government had given up trying to tell the corporate elite publicly what kind of competition law they should observe and instead entered into private and protracted consultations which, three years later, would result in a new bill entirely acceptable to big business (Maclean's, April 16, 1984:45). This legislation was lost when Parliament was prorogued for the 1984 election but appears to have constituted the basis for the Mulroney government's 1986 Competition Act.

The Enforcement Record

The history of enforcement of Canada's anti-combines laws is a bleak one. From the outset there has been a reluctance to criminally prosecute businessmen for their economic activities. Not until 1923 was a permanent enforcement official created and anonymity guaranteed complainants. All in all the legislation of 1889 to 1920 "had little, if any, impact upon business activities" (Goff and Reasons, 1978:57). Not until 1960 would a merger be challenged in a criminal court (p. 103), and only once has a contested merger been successfully prosecuted (Maclean's, July 18, 1983:36).

From 1889 to 1976-1977 (year ending March 31) there have been 173 criminal prosecutions under all sections of the combines law, an average of two annually. However, in one half of these years there were no prosecutions: there were none in the first seven years and none for five more years after that; between 1909-1910 and 1921-1922 there were no prosecutions and none from 1939-1940 to 1948-1949. Eighty-seven per cent of the cases took place after 1948-1949. In only four years were more than 10 cases prosecuted and all were in the 1970's (Gorecki and Stanbury, 1979: 157-158).

Toward the end of the period the number of uncontested cases rose (30.8 per cent in 1975-1976). Given the lenient penalties, Gorecki and Stanbury (1979:164) feel it may just be cheaper for some offenders not to defend themselves. Coupled with the fact that prosecutions do not appear to be undertaken "unless there is an excellent chance of conviction based upon legal criteria" (Goff and Reasons, 1982:289), this helps to explain why the Crown won 81 per cent of completed cases between 1889 and 1975-1976 (p. 165).

Of the various penalties provided by statute only prohibition orders and non-punitive fines have been used with any regularity and fines have not kept pace with inflation since 1900 (p. 180). Rarely have individuals been charged and despite the availability of prison sentences, no one until 1974 went to jail for a combines offence (Snider, 1980:360). In the remainder of that decade two other persons were incarcerated; all were small businessmen and all were jailed for misleading advertising, easily the most often (and cheaply) prosecuted section of the Act. The jail sentences were for one year and two of one day each. Since 1970 only one executive has been convicted of a price fixing, merger, monopoly, resale price maintenance or price discrimination offence (Gorecki and Stanbury, 1979:173).

The story of anti-combines enforcement in Canada shows "the federal government has not lived up to the philosophy behind anti-combines legislation" (Goff and Reasons, 1978:74). A principle of non-intervention prevails and the state has consistently fostered corporate growth in the name of efficiency and international competitiveness. This is most evident when the background of overall merger activity in the period to be analyzed is briefly examined.

In any 10 year period from 1945 to the end of the 1970's, two-thirds of industrial companies listed on the Toronto Stock Exchange report entering into at least one merger. In a sample of 325 new industrial companies who began operations between 1945 and 1965, 55 per cent were involved in at least one merger, most of them taken over by a larger firm (Thompson, 1979:299). Most mergers are initiated by sellers, in peak periods by a margin of four to one over buyer-initiated deals. Banks and brokerage houses, among others, earn a commission as intermediaries (p. 303).

The late 1970's and early 1980's witnessed unprecedented merger action, the rate of takeovers doubling between 1976 and 1980, giving the largest 100 non-financial corporations just over 50 per cent of all corporate assets (Maclean's, May 18, 1981:35). In 1984, nine Canadian families are said to have been in control of 46 per cent of the top 300 firms traded on the Toronto Stock Exchange (Maclean's, April 29, 1985:36).

Between 1954 and 1972, 4,400 mergers are recorded, but only 827 inquiries took place (Goff and Reasons, 1978:92). Since 1923 when mergers were first addressed by the law, only .003 per cent of recorded mergers led to a criminal charge and only .0005 per cent resulted in a conviction (pp. 103-104), a success rate that "strains credulity" (Snider, 1980:355). Canada's largest corporations are the ones most likely to be involved in mergers threatening to competition, yet in the period 1952-1972 Goff and Reasons (1978:79) found an increasing reluctance to prosecute large corporations, a finding confirmed by Snider (1980:358-359) for the period 1961-1973.

Half of all mergers in manufacturing and mining since 1900 took place between 1960 and 1972, a period when D.W.H. Henry as Director for combines matters was freely dispensing advice to business through the "Program of Compliance" by which businessmen could learn in advance whether the Director would take action in specific cases. By altering their plans in the light of information received, businessmen may achieve their goals while relieving the Director of the need to prosecute. This was the case for 15 per cent of the compliance requests in the period 1968-1969 to 1975-1976 (Gorecki and Stanbury, 1979:176).

The Department of Consumer and Corporate Affairs sees the program as preventive, yet on occasion the Director's stated intention to prosecute has been ignored and only once has he followed with legal action (Gorecki and Stanbury, 1979: 177). Business has found it can ignore the Director's blandishments with little risk. Yet D.W.H. Henry regarded it as a means by which he had won the confidence of business and took unconcealed satisfaction in the paucity of enforcement activity by his office (Goff and Reasons, 1978:109-110). In fact it is a strategy necessitated by limited funding and staffing, and the difficulties of securing convictions under the Act.

Another element of the symbiotic relationship between the state and business is found when the source of complaints is examined. The Director may launch an investigation on the basis of complaints from citizens, business or government agencies, on a directive from the Minister, on the basis of staff research or on information obtained from the compliance program. In fact, "most of the complaints are from businessmen, followed by consumers and government departments or agencies" (Gorecki and Stanbury, 1979:141). Consumers are a relatively unimportant source of information.

Not only are businessmen the chief source of complaints, they are also more successful than consumers in having their complaints prosecuted. In the period 1960-1961 to 1974-1975 business was responsible for 60.3 per cent of complaints and 67 per cent of prosecutions. Government departments and agencies have also had success in this regard. Consumers by comparison were responsible for 20 per cent of complaints in this period and only 4.4 per cent of prosecutions (pp. 146, 147).

Clearly, then, if anyone receives a degree of protection under Canada's anti-combines laws it is business itself and state bureaucracy rather than the Canadian people. The Director himself is another weak source of information; only 7.7 per cent of prosecutions were initiated by the Director in this period, and 35.3 per cent of cases initiated by him were rejected by the Attorney General of Canada (p. 147).

Conclusion

One can say two things about Canada's combines legislation. There has been plenty of it and it has had little appreciable effect. When so much time, public money and bureaucratic energy has been devoted to writing and revising laws which nevertheless remain unenforceable, it may well be asked whether the legislation exists for a purpose other than enforcement.

An outstanding feature of the period up to 1960 was the almost total absence of enforcement of the merger and monopoly provisions of the Act. Prosecutions occurred with some regularity from that year onward. Considering the evident reluctance of the state to intervene in such matters, it remains to be seen how successful that intervention was in those instances which occurred between 1945 and 1986.

FOOTNOTES

1 The purpose of this exercise is not to undertake an historical comparison of the evolution of antitrust policies in capitalist economies from their (generally laissez-faire) origins to state monopoly capitalism but to present a brief juxtaposition of the post-1945 use of regulatory mechanisms within a non-random sample of advanced capitalist economies. The objective is to delineate broad features in common and to highlight contrasting national differences arising from cultural and historical attributes. The survey will show state intervention to be a common component of advanced capitalist systems, performing an auxiliary rather than an obstructive function.

2 The nation states briefly considered here are: Canada, United States, Mexico, Britain, Australia, New Zealand, West Germany, Austria, France, Holland, Belgium, Denmark, Finland, Norway, Sweden, Spain, Switzerland, Israel and Japan.

3 In Japan different sectors of the state apparatus have clashed over regulatory policy, notably in 1980 when the courts condemned a price and production cartel by oil refiners formed as a result of "administrative guidance" from the Ministry of International Trade and Industry (MITI) which was found to be in conflict with Japan's Antimonopoly Act, enforced by the Fair Trade Commission (FTC). The courts warned that administrative guidance by MITI was no defence against a prosecution by the FTC (Hirose, 1984:106).

4 In Japan cartels are approved for a variety of reasons, some of which are peculiar to the Japanese culture. Import and export cartels, for example, are condoned "to prevent unfair export trade and to establish order in the export and import trade" (Hirose, 1984:105). Competition for foreign markets is seen as inefficient and wasteful and entry is therefore conducted on an orderly basis (Kinter and Joelson, 1974:259). Hirose (1984:106) has suggested that "historical aspects of the Japanese economy, industrial conditions today, and Japanese ways of thinking must be taken into account" in attempting to comprehend Japanese regulatory policy.

5 In Sweden prohibited agreements are subjected to negotiation between the corporate participants and a board composed largely of fellow businessmen whose presence "tends to limit the board to policies that command broad assent from business" (Edwards, 1976:363). These discussions are conducted privately in compliance with the concern of business to avoid adverse publicity.

6 In West Germany mergers must be reported if: (1) they result in a 20 per cent market share or more, or if one party already has such a share in another market, (2) in the previous year the parties together had 10,000 employees or more or a combined turnover of at least 500 million deutschmarks. Firms intending to merge must notify if at least two of the corporations each had sales of one billion deutschmarks. Prohibited mergers may be dissolved (Krauland, 1981:302-303). Under the new Canadian Competition Act prospective mergers involving combined assets of $400 million or more must be reported (Edmonton Journal, July 28, 1986: B5).

7 By the 1977 Act concentrated industries "which impede competition without adequately contributing to economic and social progress" are subject to "selective control", if such enterprises have 40 per cent or more of sales of homogeneous products or 25 per cent of sales where goods are not readily interchangeable. Mergers which surpass these levels "may be prohibited or modified" (Krauland, 1981:306).

8 In 1969 the two largest members of the iron and steel industry, controlling together 44.5 per cent of the market, were allowed to merge providing they transferred equipment and securities to competitors, provided them with technical assistance and supplied specific products on reasonable terms (Kinter and Joelson, 1974:257). Evidently 45 per cent of the market does not constitute "substantial restraint of trade contrary to the public interest" under the Antimonopoly Act (Krauland, 1981:320).

9 There has never been provision for either in Canada's anti-combines laws and none is provided for in the Competition Act.

10 In 1973 the British Parliament ordered the Hoffman-La Roche pharmaceutical firm to cut the prices of Librium by 40 per cent and Valium by 25 per cent. In a settlement with the government the company agreed to pay back 3.75 million pounds excess profit for the period 1970 to 1973, implement a "voluntary" price regulation system and "reduce the price of Valium and Librium to one-half their 1970 level" (Krauland, 1981: 311).

11 In the United States businessmen were jailed for the first time 71 years after the passage of the Sherman Act. In Canada it took even longer, 85 years (Snider, 1980:360). Even in corporatist Japan 14 corporate executives were sentenced to prison in a single price-fixing case in the early 1980's.

12 In Japan the Fair Trade Commission first issues a "recommendation" finding indicating the voluntary measures which would rectify a violation. If this is acted upon the Commission enters into formal proceedings as a tribunal, and after hearing from FTC staff and defendants presents a formal decision. Defendants may pre-empt this by accepting a "consent decree" or they may appeal the formal decision to the Tokyo High Court (Hahn, 1984:134).

In Britain the director may cite monopolies and oligopolies to the Monopolies and Mergers Commission and the Board of Trade may refer mergers. However, monopoly references "must relate to the supply of all goods or services of a particular description; it cannot relate to the activities of a named person, company or companies" (Krauland, 1981:310). The Commission cannot initiate an investigation. Having received a reference the Commission must confirm a monopoly does exist, who the beneficiaries are, whether they are exploiting or maintaining their monopoly position (monopoly per se is not an offence), whether actions of monopolists can be directly attributed to the monopoly and, finally, having established all of these, whether the monopoly operates against the public interest, and if so, what is required to end the detriment (Krauland, 1981:309-310). There seems to be plenty of excuse for inaction within these layered contingencies.

13 In Belgium anti-cartel legislation introduced in 1951 only became law in 1960. Subsequently "the government moved slowly" (Edwards, 1967:344). In Norway only seven agreements were banned between 1953 and 1960 (p. 359). In Holland agreements are privately modified whenever possible rather than being annulled, and the register of agreements is itself confidential. "Secrecy in application of the law is pervasive" (p. 356).

14 The last member to resign complained in his letter of resignation that the Board had been consistently obstructed by the Cabinet and that the 1919 legislation had only been passed to placate public concern about profiteering and to ease tension after the Winnipeg General Strike (Ball, 1934:58; Goff and Reasons, 1978: 57).

15 Not only was the voice of business the loudest: "The representations from these interested groups were also more persistent. Many of them asked for interviews with the Minister and the Director, whereas none of the academic economists or associations favouring strong anti-combines legislation did so.

The former group also appeared to have the assistance of full-time trade association personnel and lawyers, whereas those defending strong anti-combines legislation spoke on their own behalf. Under these conditions the Minister and his officials were exposed to persistent, continuous, and skilful representations mainly from one side. Trade associations, in their briefs, stressed their numerous membership and affiliation and even drafted amendments ready for inclusion in a new bill" (Rosenbluth and Thorburn, 1963:90). Clearly the regulatory process is "much less a pluralistic process than might be assumed" (Brown-John, 1981:179).

16 Bertrand has been unrestrained in his criticism of the intransigent stand taken by the business elite concerning the substantive parts of the proposed legislation. He is quoted as saying: "They are all in favour of competition, but not during the week. For them, only on Sunday" and that "business has been working hand-in-hand with government throughout Canadian history ..." (Baetz, 1985:354-355).

V. METHODOLOGY: COMPARATIVE CASE ANALYSIS

Introduction

At this juncture the methodology most appropriate to the nature of the proposed inquiry should be considered. The data is composed of cases adjudicated under section 33 of the Combines Investigation Act over a period of four decades. The paucity of cases suggests a qualitative rather than a quantitative approach.

During the period under consideration a number of changes took place in matters affecting adjudication of merger and monopoly cases under the Act (which will be discussed later in the chapter). The legislation itself underwent a transformation although not in ways substantively affecting the merger and monopoly provision. In addition Progressive Conservative and Liberal federal governments alternated in office in these years. A period of some 40 years allows for the possibility of attitudinal changes on the part of governments, the public and the judiciary to merger and monopoly activity by corporate business. Finally, the sample of cases pertains to events in every region of the country. With these considerations in mind a methodology permitting comparison of cases at a number of levels would appear to be most appropriate to the contemplated inquiry.

The method of comparative case analysis[1] is integral to the sociological tradition as its prevalence in the work of such luminaries as Tocqueville, Marx, Weber and

Durkheim attests. Weber and Durkheim, for example, "laid the heaviest burden in sociology on the comparative analysis of empirical data generated in the historical process" (Smelser, 1976:67). Both recognized the primacy of this approach, "the comparative analysis of similarities and differences in as many empirical instances as could be assembled" (p. 70). In Durkheim's view comparative analysis was not merely a branch of sociology but "sociology itself, in so far as it ceases to be purely descriptive and aspires to account for facts" (p. 2).

The Comparative Method in Contemporary Sociology

Smelser (1976:5, 151) discerns a "striking continuity of methodological principles and issues between classical and contemporary comparative studies. While data, methodological techniques and theories have changed over time, the concern is still "to explain social phenomena by establishing controls over conditions and causes of variations in these phenomena" (p. 15).

An important objective of comparative analysis is to generate hypotheses as a means of constructing theory or establishing empirical support for an extant theoretical formulation (Smelser, 1976:199; Warner, 1971:73). Hypotheses relating variables at a conceptually abstract level are more easily verified, but inferences drawn from them must be equally general (Smelser, 1976:208).

> "The general aim of comparative analysis ... is to generate logically rigorous causal explanations of

> regularities and variations in empirical phenomena" (Smelser, 1976:174).

In Apter's (1971:9) view "a general comparative theory" should contain:

> "... a set of formal and logical categories in the form of statements of relationship in which the variation of any one variable leads to 'regulated' alteration in the others".

Comparative analysis requires a certain generality of conceptualization allowing for consistent comparison of heterogeneous data when dissimilar cases are compared; comparability depends very much on arriving at concepts sufficiently abstract to overcome real empirical differences in the data and to encompass specific case content within the classificatory framework.

A distinctive need for case studies is attributable to the need to grasp complex "individual, organizational, social and political phenomena", and to the investigator "to retain the holistic and meaningful characteristics of real-life events ..." (Yin, 1984:14).

The case study is the preferred methodology when "how" and "why" questions are to be answered, "when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context" (p. 13). Such topics typically include "organizations", "decisions" and "processes" (p. 23). Defining the research questions is therefore a crucial step on the research process (p. 19). Case studies may be exploratory, explanatory or descriptive, or a combination of these (p. 15).

Among the applications of case studies outlined by Yin (1984:25) are "to describe the real-life context in which an intervention has occurred" and, more important, "to explain the causal links in real-life interventions that are too complex for the survey or experimental strategies". The greatest weakness of case studies is not in the number of cases studied but in the limited causes and effects when cases are treated as similar in terms of dependent and independent variables (Smelser, 1976:199).

In any classificatory scheme each descriptive category must be backed by empirical indicators (Apter, 1971:9; Smelser, 1976:163). The use of classification, abstract variables (and attempts to establish association between them) and empirical indicators all have in common the aim of reducing variation in context by transforming the context into a "parametric constant".[2] It is the investigator's task to impose organization on causal conditions by distinguishing between dependent, independent and intervening variables[3] and attempting to reduce as many of the latter to the status of parameters (pp. 153-154).

> "Both the selection of social units and the selection of dimensions ... can be regarded as efforts to control, by conceptual means, sources of variation in the context of phenomena. As such, they represent operations similar to explanation itself ..." (p. 185).

The choice of indicators is determined not only by their intrinsic qualities and the accuracy of measurement they promise, but also by the study's theoretical underpinnings (p. 188).

> "The validity of an indicator, in short, depends upon an implicit understanding of the relation between the process by which the indicator is produced and the theoretical purposes of the investigator" (p. 189).[4]

Choice of indicators implies:

> "...the assumption that the indicators have the same meaning or are comparable across dissimilar social units. Examined further, this involves the assumption that the causal processes generating the indicators are sufficiently similar in different social units that the indicators may be regarded as representing the same general variables" (p. 242).

Comparability of indicators hinges on the validity of the mode of classification of social units (which for this research are adjudications of the merger and monopoly provisions of the Combines Investigation Act in a defined time period) and "in part on the character of the dimension or variable that they are regarded as representing" (p. 185). Does the process by which an indicator is selected "correspond to the theory of that process that is explicit or implicit in the mind of the investigator?" Does it measure what it purports to measure? "Does the process by which an indicator is generated in social unit A correspond to the process by which it is generated in social unit B?" What is the reliability of the measure in different contexts? It is imperative that the variables putatively represented by indicators be clearly defined (pp. 185-186) and descriptively tailored to the degree of analysis required (p. 182). Variance may be eliminated by incorporating different indicators for different contexts (p. 192). For indicators to be comparable social units and their abstract variables must have some equivalence (p. 166).

Comparativeness of concepts in turn requires adequate classification.

For the purpose of this study the abstract variable at issue is that of "corporate accountability to state and law". Among the empirical indicators of this construct will be the criminal charges laid or assertions made against the corporate accused, the adjudications and underlying rationales, penalties if any, and an assessment of punitiveness, and the long-term outcome in terms of corporate performance, continued pursuit of goals, circumvention of prohibitions and the extent of follow-up or monitoring by regulators.

In selecting units of analysis: (1) units "must be appropriate to the kind of theoretical problems posed by the investigator", (2) the unit should be "causally relevant to the phenomena being studied", (3) the unit should be empirically consistent in terms of the classificatory criteria, (4) the unit "should reflect the degree of availability of data referring to this unit", (5) criteria for selection and classification of units should have reliability (pp. 172-174).

Case Study Design

A research design provides a planned procedure for scientific investigation, offering guidance to the investigator as to the questions to be investigated, relevant data, data selection and analysis. It is a way of collecting, analyzing and interpreting information and ensuring that the information is relevant to the initial research questions (Yin, 1984:28-29).

Yin (1984:29-35) identifies important facets of a case study research design relevant to the proposed study, including: (1) the articulation of research questions defining the nature of the study, (2) clear definition of cases. When the unit of analysis is an organization, subsidiary organizations and key personnel may be included and the definition of the units of analysis should include a specific, clearly delineated time frame; definitions should be comparable with previous definitions in the research area, (3) the data must be linked to hypotheses as by "pattern-matching" in which two or more conflicting potential patterns (here, conflicting theories of the state and law) are compared with the actual data and that which is closer to the empirical pattern is preferred, (4) criteria for interpreting the study's findings should be specified.

The quality of the research is safeguarded by several measures. Construct validity is attained by formulating constructs, hypothesizing relationships between them and testing them empirically (Kerlinger, 1973:461). The variables of interest should be clearly identified and appropriate measures drawn up. Subjectivism during data collection is thereby precluded. Construct validity is assisted when multiple sources of evidence and a "chain of evidence" are employed[5] (Yin, 1984:37), yielding similar meanings for the construct or accounting for differences (Kerlinger, 1973:462).

Secondly, internal validity refers to the validity of inferred causal relationships. Pattern-matching and "explanation-building"[6] provide assurances of internal validity (Yin, 1984:38). Third, external validity is the degree to which case study findings are generalizable to a body of theory (pp. 38-39). Lastly, case studies are subject to the same imperatives of reliability as any other research. Procedures should therefore be as explicit as possible.

In a multiple-case study each case serves to strengthen support for a problematic by means of a replication effect. Each case is treated as a "whole" study in the replication process, whose dependent variable must be replicated by succeeding cases.

Comparative Corporate Case Studies

The comparative method has traditionally been used to make macro-level historical comparisons either between contemporary societies or between successive eras within the same society. Here the method is adapted to a more particularistic contemporary issue, post-war anti-combines law enforcement in Canada

It is proposed to conduct a comparative case analysis of 12 Canadian corporate regulatory defendants who constitute an exhaustive sample of merger and monopoly cases fully adjudicated under section 33 of the Combines Investigation Act within a defined time period, 1945 to 1986. Corporate crime is an area of research that has received comparatively little attention from criminologists and almost none in Canada. Therefore, in evaluating theories of the state and law in the light of the data, the possibility of "revelatory" findings and incremental advances in theory are present.

The cases will be presented in a multi-narrative form in which the content will consist of background information, criminal charges or assertions, ex parte arguments and judgements or administrative rulings. Since the research is dependent on documentary sources, data limitations can be anticipated. In cases which were handled administratively by the Bureau of Competition less information is available, particularly in matters pertaining to the rationale for decisions made. Nevertheless, minimal data concerning case particulars and outcome is recoverable. Information has been drawn from newspaper articles, law and academic journals and the annual reports of the Director of Investigation and Research for the Act, the sources being dictated by the availability of data.

The multi-narrative presentation is then followed by a cross-case comparison of case particulars and outcome. Since the cases are broadly of two types, those adjudicated by the courts (eight cases) and those administratively assessed (four cases), comparative analysis is possible at several levels: (1) a within-group comparison of the court cases in terms of similarities and differences, particularly with regard to verdict and plea (one case was not contested). What were the factors in common for the cases yielding verdicts of guilt and what differences can be discerned between them? How punitive were the sanctions imposed? What factors are shared by the cases resulting in acquittals? (2) A within-group comparison of administratively handled cases according to the same critera, (3) a comparison of in-court and out-of-court strategies by the Crown. What rationale for the respective procedures can be discerned? (4) The analysis closes with an assessment of the competing theoretical models of the state on the basis of the overall pattern of enforcement revealed by the data.

Conducting Case Studies

Open-mindedness is an important prerequisite in case study research. Questions should arise in the investigator's mind in response to findings, answers to which should provoke new questions. A flexibility of mind allows for interaction between theoretically-derived propositions and accumulating data. Data collection is a test of observation powers and the ability to deal with unforeseen developments in the nature of the data without bias, incorporating contrary findings into the body of data with appropriate propositional adjustments (p. 57). A clear grasp of the theoretical issues and the substantive questions arising therefrom is the best guarantee that the study will stay on course and that the need for design change will be recognized. The researcher's perceptual sensitivity, according to Yin (1984: 57), extends to "reading between the lines" when perusing documentary evidence. Such "insights", of course, would require corroboration from other sources.

In multi-case studies a case study protocol, incorporating an overview of the project, the research questions, the research instrument, procedures and rules and the objectives of the study, is indispensable (pp. 64-74). The protocol gives the investigator an "holistic" view of the project.

Data Collection

The source of data relevant to the study is that of documentary evidence, made up of formal published studies and newspaper articles,[7] none of which may be taken to be literal accounts of events (p. 80). Several documents dealing with the same event may be used for purposes of corroboration. Conflicting evidence will be pursued for some means of resolution. (It should be borne in mind at all times that the documents were compiled for purposes other than those of the research).

A clear distinction is to be made between the information included in the final study report and the full body of data constituting the data base (p. 92). The data base provides background information in the form of notes and source documents on the history of the study and is, in conjunction with the "chain of evidence", a means of checking for methodological rigour.

In an attempt to answer the above questions it is proposed to examine an exhaustive sample of cases proceeded with to an adjudicative conclusion by the courts and by the Bureau of Competition of the Department of Consumer and

Corporate Affairs in the period January 1, 1945 to March 31, 1986 (end of the fiscal year), shortly after which the Combines Investigation Act lapsed and was replaced with the Competition Act.

Each of the cases arose from an apparent violation of section 33 of the former Act, which reads:

> "Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years" (R.S. 1978, c. s. 33, C-23).

Of the sample comprising 12 cases, eight were adjudicated before the criminal courts and four were disposed of by administrative decisions of the Bureau of Competition Policy. A case may be defined as any instance of alleged violation of the merger and monopoly provision of the Combines Investigation Act (contained in section 2 of the Act until August 10, 1960 and section 33 thereafter) which resulted in either a juridical ruling before the criminal courts or an administrative finding of wrongdoing by the Bureau of Competition Policy. Excluded are cases in which criminal charges were laid and later withdrawn and all instances of "discontinued inquiries" reported in the annual reports of the Director of Investigation for the Act.

Analyzing Case Studies

Yin (1984:100) stresses the importance of a general analytic strategy for this, the most difficult stage of case study research, "to treat the evidence fairly, to produce compelling analytic conclusions, and to rule out alternative interpretations". The preferred approach here is to frame the analysis around the study's conflicting paradigms which directed data collection in the first place. These help to differentiate between core and peripheral data at the analysis stage and offer direction in answering the "how" and "why" questions.

More specifically, analysis may take the form of pattern-matching techniques, one form of which is to compare several explanations to account for a known outcome (pp. 105-106). Alternatively an "explanation-building" approach may be taken (pp. 107-109).

> "The gradual building of an explanation is similar to the process of refining a set of ideas, in which an important aspect is again to entertain other plausible or rival explanations. As before, the objective is to show how these explanations cannot be built, given the actual set of case-study events. If this approach is applied to multi-case studies ... the result of the explanation-building process is also the creation of a cross-case analysis, not simply an analysis of each individual case" (p. 109).

The interpretive framework pertinent to this study lies in the pluralist, instrumental-elitist and structural-conflict theories of the state and law outlined in chapter two and their ability to interpret patterns of regulatory enforcement. In examining the procedural chronologies of these cases it is anticipated that the data may lend confirmation to more than one problematic; no attempt will be made to predict where a preponderance of support will lie. Pattern-matching may be applied to each case but explanation-building is only derived from the overall pattern of developments.

An analytic distinction between "manifest" and "latent" functions may be useful. The value of an analytic approach which considers the presence of latent functions is the possibibility of revelatory findings, the emergence of a qualitatively different kind of data, paradoxical in relation to received knowledge. With the concept of latent function "the sociologist extends his inquiry in those very directions which promise most for the theoretic development of the discipline" (Merton, 1957:66). One reason for this is that behaviour which appears inexplicable when viewed at the manifest level may reveal deeper meaning when secondary, less visible consequences are considered. How, for example, can apparently irrational yet sustained behaviour be explained unless such actions can be shown to perform a function "quite remote from the avowed purpose of the behaviour"? (p. 64). Can the longevity of Canada's anti-combines laws and their substantive non-enforcement be reconciled? Anti-combines law may be an instance of a social phenomenon "designed to achieve an objective which one knows ... cannot be thus achieved" (p. 65). What appears to be irrational because the posited objective is seen to be impracticable may be (if latently) functional, at least for some members of society. The notion of latent function may serve to clarify the apparent illogicality of maintaining (for almost 100 years) a body of law which has been rarely enforced in its substantive provisions and when "enforced" has proved unenforceable.

The manifest function of Canada's anti-combines laws is not hard to find. It is to be found on the opening page of every annual report of the Director of Investigation and Research for the Act.

> "The purpose of the Combines Investigation Act is to assist in maintaining effective competition as a prime stimulus to the achievement of maximum production, distribution and employment in a mixed system of public and private enterprise". To this end, the legislation seeks to eliminate certain practices in restraint of trade, and to overcome the negative effects of concentration, both of which tend to prevent the economic resources of Canada from being used most effectively to the advantage of all" (Annual Report, Competition Act, 1986:1).

So much for the manifest function. It is postulated that a latent function of anti-combines law and a key to understanding its litigious failure is to legitimize the ongoing concentration of corporate capital and the social and economic order congealing around it, while appearing to regulate corporate capital "to the advantage of all". As Merton (1957:52, 51) pointed out social practices may be "functional" for some groups while simultaneously "dysfunctional" for others, with a net balance of "positive" and "negative" effects. In the context of a class society any state initiative may be examined in terms of the basic query: "Who benefits?" (Chambliss and Seidman, 1982:177).

In light of this premise it may be speculated as to who have been the likely beneficiaries of competition policy in Canada. It can be argued that the chief beneficiaries have been the state and the corporate elite, both of whom have historically advocated and implemented a program of enhanced growth through concentration of ownership of the means of production. For both, it can be argued, anti-combines law has been functional in that it has not constituted an obstacle to the achievement of their shared economic objectives. Viewed in this way state policy and juridical pronouncements on combines matters have largely been congruent. Those for whom the law has principally been dysfunctional include small business (the target of most enforcement under the Act) and the Canadian public who have paid politically and monetarily for an oligopolistic economy.

From this perspective anti-combines law can be seen to have had multiple consequences for diverse groups in Canadian society, with a net balance in favour of the systemic dynamic of state monopoly capitalism. A pluralist problematic is unable to explain the consistent failure to successfully prosecute corporations in those sections of the Act most threatening to corporate power and, secondly, the unvarying impotence of the legislation despite periodic rewriting whenever its legitimation role appeared to falter. Such a perspective is reduced to the kind of "naive moral judgements" abhorred by Merton (1957:70-71), derived from "muckraking" and accompanied by exhortations to "throw the rascals out". The weakness of the pluralist paradigm lies precisely in its failure to discern the structural basis for what, at the level of instrumentalism, might be seen as duplicitous behaviour on the part of the state elite (at minister and deputy minister level).

The Manifest-Latent Typology and Models of the State

Merton's manifest-latent functions typology can be incorporated into the theoretical models of the state discussed in chapter two, in that each model logically anticipates patterns of enforcement interpretable in terms of manifest and latent purposes.

The liberal model premises an active interventionary state in defence of competitive capitalism, countering tendencies toward oligopolization and impartial in arbitrating between economic interests. In support of its rationale the model appeals to readily perceived overt decisions such as judicial rulings and Cabinet orders, while ignoring the more prevalent phenomenon of non-intervention.

The instrumental-Marxian view of the regulatory state suggests little if any enforcement of law against corporate capital and only highly symbolic legislation expressive of "free enterprise" ideals, drawn up almost entirely to serve the (latent) legitimation needs of capitalism and of the state itself. The regulatory system is perceived as actively solicited by and serving the interests of corporate capital. In confirmation of this thesis the instrumental model alleges less visible covert decision making processes such as can be elicited by indefatigable investigative journalists and are occasionally revealed in "snapshot" fashion by scandals such as Skyshops and Watergate. At such times evidence of complicity between political and corporate elites in law violations becomes apparent but in these glimpses there is no hint of the structural, grounded nature of such symbiosis. To know the full extent of the state-corporate cabal and its ramifications would require the retrospection of the historian with full access to sources. Since only vignettes of the inner workings of state-corporate relations are available, the underlying systemic nature of those dealings are not immediately apparent and there is a theoretical tendency to personalize wrongdoing and attribute it to isolated conspiracies between respective elite members.

The structural-Marxian model postulates the relative autonomy of the state and endows it with an ability to intervene against specific capitals in the long-term interests of capital collectively. This projects a regulatory policy of selective, if infrequent interventions to counter mergers dysfunctional for the long-term welfare of capital.

Ratification of this view is sought at the deeper structural level of "non-decisions". Within the terms of the model no political decisions are required for non-intervention in that the objective of state policy is to facilitate accumulation as efficiently as possible and with all the resources at the disposal of the state. Concentration of corporate ownership is the chief means to this end and is in concert with the immanent "laws" of capitalist development insofar as every industrializing capitalist economy has undergone this dynamic. A hypothesis formulated along these lines would be falsified: (1) if regulatory intervention was shown to be routine (for example, every instance of mergers exceeding $300 million in combined assets), (2) a high proportion of such interventions were successful (obstructing merger initiatives).

A pivotal state resource assisting accumulation is a legal system which concedes to the corporate elite the prerogative of physically restructuring capital in the name of long-term accumulation goals. Concurrently, the state has the task of legitimizing the process of oligopolization and reconciling it with the popular ideology of competitive "free enterprise". An integral legitimation device is "anti-combines" law, the manifest purpose of which is proclaimed to be the defence of some minimal level of competition but whose intent is to maintain social peace by placating public opinion and resolving differences between specific factions of capital. Combines law is not, however, totally symbolic and the state as overseer and coordinator of production will have reason to mobilize the law in particular conjunctures when specific mergers, monopolies or cartel agreements appear to be systemically dysfunctional, politically troublesome or impede state policy objectives. The most likely outcome of such interventions is a negotiated one outside the sphere of the courts.

The conclusion drawn from the structural model, then, is that the main purpose of combines enforcement policy is to legitimize the capitalist order in the eyes of all non-elite members of society. A secondary function is to counter specific capitals when their ventures are perceived as dysfunctional or otherwise counter-productive to the long-term interests of capital as a whole.

The Exemplary Case Study

The proposed research appears to meet the requirements of the "exemplary" case study. An exemplary case study is one in which: a) the topic is one of "unusual and of general public interest" or "nationally important" or theoretically significant, or all three (p. 140). A study may be significant because it is "revelatory", dealing with subject matters that social science has not been able to (or chosen not to) study previously. Further, a case may be significant because it permits comparison of rival propositions drawn from a celebrated body of theory.

> "Finally, imagine the situation in which both discovery and theory development are found within the same case study, as in a multiple-case study, in which each individual case reveals a discovery but in which the replication across cases also adds to a significant theoretical breakthrough. This situation truly lends itself to the production of an exemplary case study" (p. 141).

b) The study should be complete in that the boundary between the case study's content and its contextual background are approached and as the case periphery is met the information garnered is "of decreasing relevance to the case study" (p. 141). It should be clear that all the relevant data about each case have been obtained.

c) An exemplary case study will make it clear that while one set of propositions have found support in the case-study data, alternative propositions have been strongly refuted. These alternative propositions should have been selected in the first place for their potential for refuting the propositions confirmed by the findings and have been argued as forcefully as possible (pp. 142-143).

d) An exemplary case study is one in which all critical items of data pertaining to rival propositions are presented neutrally and unequivocally. All cases in a multi-case study will have been given equal weight in this regard and have contributed equally to the cross-case analysis. This will be reflected in the chain of evidence.

e) Finally, an exemplary case study is one which is written up in a lucid and "readable" form sustaining the attention of the reader.

The Projected Study: Questions of Comparability

Since a comparative analysis of events occurring between 1945[8] and 1986 is being considered, it is pertinent to ask what legislative and policy changes may have taken place that will have affected comparability. From 1960 onwards the merger and monopoly provisions of the Combines Investigation Act were regarded by regulators as increasingly unenforceable, following acquittals in two major cases that year. Instead, greater emphasis was placed on consultation and negotiation (Gorecki and Stanbury, 1979:175).

When overall state economic management is considered the period appears to contain a marked policy change from that of the Foreign Investment Review Agency (FIRA) to that of Investment Canada, which succeeded it in 1985. In fact the "change" is more apparent than real for throughout the period Canada was "open for business", as the record of FIRA shows. Set up in April, 1974, FIRA by the middle of 1976 had approved 84 per cent of takeovers involving foreign acquisitors and 94 per cent of new foreign applications (Clement, 1977:238-240). The period features increasing concentration of resources by merger and foreign acquisition, low levels of research and oligopolistic pricing and market sharing, a continuation of what has historically been "a quite dismal entrepreneurial record" (Hardin, 1974:70).

Comparability of Cases

In the period covered by the cases there have been three revisions of the Act. The major changes in the 1952 amendments were administrative and no legislative change occurred in the merger and monopoly provisions (Consumer and Corporate Affairs, 1976:214). The important factor pertaining to the comparability of cases is the 1960 amendment to the Act affecting mergers and monoplies. Until August 10, 1960 mergers and monopolies were considered under section 2(a)(vi) of the Act as amended in 1952. Two of the cases to be considered were tried under the unamended legislation, since charges were laid in 1959. Under the Act as it then was section 2(e) defined "merger, trust or monopoly" as "one or more persons" who:

> ... either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged ..." (34 C.C.C. (2d.) 496).

By the amendment of August 10, 1960 "merger" and "monopoly" were defined separately. "Merger" was described as:

> "... the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person whereby competition ... is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others" (R.S. 1978, c. s. 2, C-23).

"Monopoly" was:

> "... a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers, or others ..." (s. 2).

In both versions of the Act monopoly is given as "one or more persons" who "either substantially or completely control" throughout Canada "the class or species of business" in which they are engaged. In the 1952 Act the specified harm induced by a prohibited merger, trust or monopoly was that it:

> "... has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others" (34 C.C.C. (2d.) 495).

This condition is reproduced in the amended act almost word for word in the definitions of "merger" and "monopoly" and clearly the intent remains the same. The essential difference between the two versions of the Act is that in the earlier version "merger" and "monopoly" occupied a subsection of section 2(a) which dealt primarily with illegal agreements under a heading of "combines", while in the 1960 Act "merger" was defined separately from "monopoly" and both were placed in a new section (section 33) while prohibited agreements (formerly section 411 of the Criminal Code) now appeared in section 32 as "conspiracy". There does not, therefore, appear to be a problem of comparability as far as the wording and apparent meaning of the respective drafts are concerned.

The fact that the cases were drawn from different regions of the country should not be any impediment either, since all cases were adjudicated under a federal law. Nor should alternating party government (Progressive Conservative, 1960-1963, 1979-1980, 1984-1986; Liberal, 1963-1979, 1980-1984) be problematic as there is no evidence that either party conducted anything other than a "hit and miss and political ..." (Snider, 1980:365) approach to anti-combines enforcement throughout the period. It has been shown in the previous chapter that government policy was undeviatingly pro-capital, pro-merger and pro-foreign acquisition despite cosmetic legislative changes. On taking office in 1984 the Mulroney government largely adopted the latest Liberal legislative proposals introduced to Parliament just before the election was called.[9]

FOOTNOTES

1 Yin (1984:23) defines the case study strategy in the following terms. "A case study is an empirical inquiry that: investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used".

2 Parameters are conditions "known or suspected to influence a dependent variable" (Smelser, 1976:154) but which in a specific study are rendered innocuous. Antithetically, "operative variables" are conditions thought to influence the dependent variable and which in a specific study "are allowed or made to vary in order to assess this influence" (p. 154). The investigator himself, in selecting social units and identifying their empirical indicators, may act as an operative variable, and his role must therefore be taken into account (p. 165). By transforming conditions into parameters and operative variables "scientific explanation is refined and generalized" (p. 155). While this can be accomplished in a variety of ways including experimental and such non-empirical methods as appeals to logic, psychological imputations and mental experiments (pp. 155-161), of relevance here is the recognition that data is most often historically received and manipulable only within limits. When paucity of cases precludes statistical manipulation "systematic comparative illustration" may be adopted (p. 157) by which residual potential causal variables are identified after parameters have been singled out. Another option is "deviant case analysis" in which one case is compared with several others in terms of different outcomes. The causal process is then "traced backwards" until the source of variation is found. Another means of reducing variance is to select cases "that resemble one another in significant respects" (p. 215) and can be so demonstrated empirically.

In asserting a causal relationship between specific variables the assumption is made that other variables present are parameters (p. 238). It is important, then, to identify what it is that is unquestioned in parametric assumptions since "these often constitute repositories of the kind of weaknesses of theory that are often most difficult to discern - weaknesses involving unverified generalizations, questionable assumptions, and unverified variables" (p. 237).

3 The identification of dependent, independent and intervening variables is of limited usefulness to

the projected study in that it will be argued that an analytic distinction between "manifest" and "latent" functions of the legislation may be of some heuristic value. Merton (1957:51) defines "manifest functions" as objective consequences of social action "intended and recognized" by actors. "Latent functions" are those objective consequences neither intended nor recognized.

For the purpose of exegesis the dependent variable can be said to be the juridical/administrative outcome of each case. Independent variables are to be found in such matters as the background data to each case, the criminal charges or allegations levied and arguments in defence of the accused. Intervening variables may be said to reside in previous judicial interpretations of section 33 and its antecedents, government enforcement strategies and overall competition policy.

4 The theory provides the rationale for imputed causal relations and must be assessed on a number of grounds: (1) in terms of what it perceives as varying and constant; the explanatory range of the theory is thus revealed, (2) in terms of how much of the theory is derived from empirical data and how much from "other knowledge", a potent source of error, (3) in terms of how much of this "other knowledge" remains unarticulated, ambiguous or vague, (4) in terms of whether parameters are generalizable to all units being studied, (5) in terms of whether assumed parameters behave as constants when subjected to direct empirical test (pp. 239-241).

5 A chain of evidence facilitates a test for reliability for it allows someone other than the investigator to trace the raw data to the published findings and vice-versa, ensuring that the study findings are entirely justified by the background material and that nothing has been lost or suppressed. All information in the study report should have been attributed to its documentary source. The data base will also reveal whether the procedures outlined in the protocol were in fact observed through the study.

6 Explanation-building is a mode of analysis in which a proposition is revised against the findings of several case studies in turn so that in the course of empirical comparison the propositional thrust may be entirely transformed. Given that this is so care must be taken to ensure that the intent of the study is not lost (Yin, 1984:107-109).

7 Other sources of data might be archival records, interviews, direct observation, participant-observation, and physical artifacts (Yin, 1984:81-89). Yin (pp. 90-91) counsels against the use of any single source of data. However, when analyzing events that are completed and which occurred in disparate time periods and geographical locations the investigator may have no recourse but to resort to documentary records alone.

8 The research period is defined in terms of the periodization of the Canadian state. The war years and immediate post-war period represent a watershed in the evolution of the Canadian state, in that these years saw a marked change both in the structure of the state apparatus and in popular attitudes to the question of state intervention in social and economic affairs (Moscovitch and Drover, 1987:27). The year 1945 is therefore an appropriate starting point for the analysis of state regulation in Canada.

The state apparatus expanded rapidly in the period 1939-1950 and the federal government "exercised vast powers over the economy" (Stevenson, 1977:81). The war provided incentives for combines under cover of government sponsored industry associations.

Legitimation only received serious attention for the first time in the 1940's when a program of social welfare spending was undertaken, supported by some sectors of the bourgeoisie, in order to defuse a shift to the left (reflected in the growing popularity of the Cooperative Commonwealth Federation and increasing union militancy) and to maintain productivity and employment in the post-war years (Finkel, 1977:360-361; Guest, 1987:217; Panitch, 1977:20). The federal state soaked up surplus capital and used it for social welfare spending (Chorney and Hanson, 1980:72). In 1940 the Rowell-Sirois Commission called for a strong federal state and received the support of most business interests and the Tory Party. Business and labour looked to the state for a coordinated attack on unemployment (unemployment insurance, labour exchanges were introduced). There was a call for economic planning; the federal state was to be a "major source of investment" when private investment was inadequate (Finkel, 1977:356), a reaction to the depressed 1930's and fear of post-war economic depression and social disorder.

The Liberal government reluctantly embarked upon piecemeal social reform beginning in the war years, introducing family allowances, mortgage lending, incentives to business and state spending to convert the economy to peacetime production. In the 1960's came Medicare, the Canada Pension Plan and increased transfer payments to the provinces. The adoption of a Keynesian economic policy was evident in the "White Paper on Employment and Income" in 1945 (p. 362). The state would budget for surpluses in "boom" conditions, deficit spending during economic downturns.

The chief object of social reform was enhanced accumulation. Part of the muted legitimation function was anti-combines enforcement. After 1945 came reforms of the regulatory bureaucracy, legislative amendments and marginal improvements in regulatory funding, but enforcement was mainly confined to small capital (only two merger/monopoly prosecutions between 1910 and 1950). Since 1960, in the face of weak legislation, the regulatory emphasis has been on consultation with business and orders of prohibition.

9 As in the 1984 Liberal bill the Competition Act of 1986 transfers merger and monopoly matters to civil from criminal law while leaving illegal agreements within the criminal jurisdiction. The 1986 Act reduced the level of combined assets at or above which the Competition Bureau must be notified of intent to merge, from $500 million in the Liberal bill to $400 million (Competition Policy Record, June 1986:15, 18).

VI. THE ENFORCEMENT OF THE COMBINES INVESTIGATION ACT, 1945-1986: (1) 1945-1973

Introduction

Beginning in 1951 until the Combines Investigation Act lapsed in 1986, a number of combines cases were adjudicated by both judicial (eight cases) and extra-judicial means (four cases). An exhaustive sample comprising these 12 cases is presented in chronological order and (for the sake of convenience) in the next two chapters (see Appendix 1).

EDDY MATCH CO. LTD. ET AL. V. THE QUEEN

Background

Prior to December, 1927 (when it was alleged that Eddy Match and its subsidiaries formed an illegal combine) there were several manufacturers in Canada: the World Match Corporation, controlled by Swedish Match; Canadian Match Company, jointly owned by Bryant and May; Diamond Match of the United States and the E.B. Eddy Company (Lyon, 1963: 175). There was also a smaller producer, Aurora Match).

In December, 1927 the Eddy Match Company was set up "for the purpose of taking over the business of Canadian Match and World Match and the match business of E.B. Eddy Company" (109 C.C.C. 6). It appears that the merger of the three companies had already been accomplished and the Eddy Match Company was incorporated to administer the formerly independent concerns. Bryant and May received approximately 60 per cent of the shares of the new firm and Diamond Match obtained 25 per cent (Lyon, 1963:175).

> "The cartel members, outside Canada, decided that Canadian production would be sold only in Canada, and that they would not export matches to Canada. This three-company merger gave Eddy Match a monopoly of the domestic market; competitive imports were barred by the policies of the international cartels, Bryant and May, and Diamond, which also held the controlling interest in Eddy Match" (p. 175).

The company immediately acquired Aurora Match, then followed a policy of "acquiring new competitors after undermining their trade through unfair and discriminatory sales practices" (Rosenbluth and Thorburn, 1963:68). As new competitors appeared "Eddy flooded their sales areas with underpriced brands" (Newman, 1975:168).[1]

The Columbia Match Company, for example, was incorporated in 1928, began production at St. John's, Quebec the following year and "for a while was the most successful competitor" (p. 168). The President of Eddy Match instructed a vice-president to pay close attention to the competitor's operations "and see that they are carefully attended to if they attempt to take any of our business" (pp. 168-169). After three years of coping with "fighting brands" the Columbia Match Company passed into bankruptcy in 1932, whereupon its nemesis "secretly purchased the plant and operated it as the Commonwealth Match Company" (p. 169). In 1947 Commonwealth's shares were transferred to the Valcourt Company Limited, an Eddy Match subsidiary (109 C.C.C. 6).

In 1931 an independent manufacturer, Canada Match

Company, was incorporated. In 1936 it was acquired by Eddy Match. In that year the Federal Match Company Limited appeared and four years later it was taken over by Valcourt. Between 1937 and 1947 Valcourt acquired the shares of Canada Match, Federal Match and Commonwealth Match (p. 7). The Quebec Court of Queen's Bench (Appeal Side) would find that Valcourt "acted only as a holding company and was never engaged in the production of matches" (p. 7). All four firms were managed by Eddy Match as ostensibly independent companies in order to maintain a facade of competition through the years (Newman, 1975:169).

After the war the industry drew the attention of the activist Commissioner[2] of the Combines Investigation Act, F.A. McGregor, who conducted an investigation into the manufacture, distribution and sale of wooden matches in Canada. His report was submitted on December 27, 1949. The report alleged a combine (merger, trust or monopoly) had existed since the 1927 amalgamations "and which had persisted since then through various means, including the acquisition of various independent match businesses subsequently established" (Annual Report, Commissioner of the Combines Investigation Act, 1949-1950:4).

Following publication of the report the Minister of Justice, after consulting the Attorney-Generals of Ontario and Quebec where the parties to the alleged combine were based, ordered a criminal prosecution (p. 4). After a preliminary inquiry five defendants, Eddy Match Company Limited, Commonwealth Match Company Limited, Canada Match

Company Limited, Federal Match Limited and Valcourt Company Limited, were committed for trial on October 3, 1950 (Annual Report, Commissioner of the Combines Investigation Act, 1950-1951:8).

> "Four charges under the Combines Investigation Act were duly laid, alleging respectively the existence of a combine detrimental to the public, by way of: (1) a merger, trust or monopoly substantially or completely controlling the business of producing, manufacturing, supplying or dealing in wooden matches; (2) a merger, trust or monopoly which purchased or otherwise acquired control over the whole or part of the business of other companies making wooden matches; (3) a combination fixing a common price or a resale price of wooden matches; (4) a combination having or designed to have the effect of preventing or lessening competition in the trade of wooden matches" (p. 8).

Judgement

The trial on the first of the four charges[3] opened in the Quebec Court of King's Bench (Crown Side), before Mr. Justice J. Bienvenue on April 2, 1951 and concluded on May 28 of that year (Annual Report, Commissioner of the Combines Investigation Act, 1951-1952:8). Judgement was delivered on October 29, 1951.

The five accused were charged with an offence under section 32 of the 1927 Combines Investigation Act, that between December 14, 1927 and September 8, 1950 the defendants:

> "... were parties or privies to or knowingly assisted in the formation or operation of a combine within the meaning of the Combines Investigation Act, to wit: a merger, trust or monopoly which, during the said period, substantially or completely controlled throughout Canada, excluding Newfoundland, the class or species of business in which they were

> engaged, to wit: the business of producing, manufacturing, supplying or dealing in wooden matches, a commodity which may be and then was the subject of trade or commerce, which merger, trust or monopoly has operated or was likely to operate during the said period to the detriment or against the interest of the public, whether consumers, producers or others" (104 C.C.C. 40).

The elements of the offence as adumbrated by the Court were: (1) the existence of a combine within the meaning of the Act, (2) personal participation in the formation or operation of the combine, (3) assistance with full knowledge in the combine's formation or operation (p. 41). The Crown had argued that the Eddy Match Company had participated in the formation or operation "as the principal in the first degree ..." (p. 41) and that the four subsidiaries had offended by complicitly assisting the parent company to that end. The legislation did not distinguish between principals and accessories, only stipulating "that there should be a concurrence and an agreement of different persons to bring about and maintain a merger, trust or monopoly ..." (p. 42). Whether the combine did or did not in fact so operate was immaterial. It was enough if by means of the combine the parties to it controlled "substantially or completely" the match business. The Court's prerogative was to examine "the very nature of the plan contemplated without regard to its result" (p. 42).

> "The combine is illegal when the free play of competition is paralyzed or likely to be. So willed the legislator of an Act that does not lend itself to ambiguity, and so the Courts have ruled on many occasions in jurisprudence set out at the end of this judgement" (p. 42).

The Court considered a number of defence motions. It was argued that matches did not constitute a "commodity" and therefore could not be subject to monopoly in terms of the Act. Mr. Justice Bienvenue pointed out that a commodity was anything "which may be the subject of trade or commerce" in "any class or species of business in which a person is engaged" (p. 43). Counsel had also maintained that the combine, if such it was, was not formed by the accused but by their corporate predecessors. To this the Court replied that the Act said it was enough to have participated or assisted in its formation or operation, "or to have either substantial or complete control throughout any area of Canada to be guilty of the offence" (p. 43). It was further contended that the defendants' practice of setting a common resale price was not in contravention of the Act; section 2(1)(c), the Court responded, clearly showed resale price maintenance was illegal (pp. 43-44). The defence argued that the alleged combine had not operated to the public detriment; the legislation deemed it sufficient that it be likely to operate in such a fashion (p. 44). One attorney, while suggesting the element of control was absent, admitted that in the later years of the period of the charge Eddy Match "was the outright owner of the four other defendant corporations and that the latter were only subsidiaries" (p. 44).

In the face of incriminating inter-corporate correspondence defence counsel directed the attention of the Court to the corporate "minute books" which did not reflect the sentiments expressed in the former, a circumstance which did not surprise the Court, since signatories to the correspondence had suggested that recipients "destroy the documents in question after having read them, which does not seem to have been done" (p. 44). In such prosecutions, Mr. Justice Bienvenue noted, "one seldom finds, if ever, concrete, clear-cut evidence of agreements the purpose of which is to create a monopoly or to operate it (pp. 44-45). It is not anticipated that evidence will show corporate representatives "met and agreed in an explicit manner to organize a combine, a trust or a monopoly with a view to brush aside all competition" (p. 45). It was enough for the Court, on the basis of all the evidence, to find that a tacit agreement in violation of the Act was entered into and acted upon "regardless of the results obtained" (p. 45), and the evidence laid before the Court strongly suggested that that was the case in this instance.

> "It does seem, in fact, that since its incorporation or shortly afterwards, the Eddy Match company prepared a plan to cause the disappearance of rival industries, to absorb them if necessary, and in any case, to eliminate competition, in a word, that it took the necessary steps to remain alone or almost so in the wooden match trade and commerce, and this by using methods that the Act does not authorize" (p. 45).

The defence also questioned the applicability of section 39A, incorporated into the Act two years before. This section created a procedural exception to the ordinary rules of evidence.

"It stipulated among other things that when a thing

> was done, said or agreed upon by an agent of a participant, this thing shall prima facie be deemed to have been done, said or agreed upon, as the case may be, with the approval and authority of that participant.
>
> It stipulated furthermore that when a document written or received by an agent of the participant is offered in evidence, that document shall prima facie be deemed to have been written or received, as the case may be, with the authority of that participant" (p. 46).

Finally, the section made it clear that documents proved to have been in the possession of a participant or on premises used or occupied by a participant shall be prima facie evidence of the participant's knowledge of the document and its contents and that anything recorded in the document concerning matters said, done or agreed by any participant or agent thereof carried the authority of that participant (p. 46).[4]

The Court pointed out that every presumption contained in section 39A was rebuttable by contrary evidence. The section simply meant that documentary evidence was valid at first sight and was sufficient by itself "barring contrary proof" (p. 47). Defence pleas that the section was not applicable to the case before the Court and concerned a matter of substantive law and not that of procedure (and could not therefore be retroactive) were dismissed (pp. 47-49). Similarly rejected was a claim that no penalty could be levied because it was more than two years "after the cause of the action arose or after the commission of the offence" (p. 50). The Court declared the offence to be a continuing one between 1927 and 1950.

Drawing upon jurisprudence Mr. Justice Bienvenue noted that the agreement or arrangement by which a combine comes into being must be "one designed to prevent or lessen competition" and "must be also an attempt at what would be an unduly doing thereof, that is agreed upon" (p. 51) whether acted upon or not, successfully or otherwise. Previous judicial rulings had declared illegal combines to be "the ruin of many by the temporary lowering of ... prices" and, despite some immediate gains to consumers, were likely to result in higher prices than could arise from competition:

> "... and generally as much higher as can possibly be extracted from the public regardless of any measurement of price by way of what a fair profit requires. In the long run it means, if successful, the reaping of enormous wealth by the few, to the detriment of the many" (p. 52).

Jurisprudence had established that an agreement which had as its object the attainment of a virtual monopoly in a market by quashing competition was illegal.

> "In the present instance, the fact alone that the aim of the parties to the agreement was to secure control of the market for their commodity in Canada affords a sufficient basis for a finding that the agreement was one which, if carried into effect, would gravely prejudice the public interest in free competition" (p. 54).

A competitor or even a combination of competitors may increase their share of the market up to and including an absolute monopoly as long as it does not interfere with the right of other firms to compete but arrived at its market dominance by "proper methods".[5] However, no enterprise should set out to obtain monopoly control by interfering with the ability of others to offer competition, "that is, by killing off or preventing the competition of outsiders by means of unfair methods"[6] (p. 58). By such means the Court found Eddy Match and its corporate affiliates to have constituted a combine from 1927 to 1950 within the meaning of the Act.

> "From the very beginning of this long period of time, defendant made provision for the necessary steps to eliminate from the sphere of activity of its trade and commerce every competitor already there or coming in to do business" (pp. 58-59).

This was achieved by means of unfair and illegal competition and by purchasing and absorbing competitors. The monopoly won by Eddy Match was not arrived at fortuitously "but on the contrary ... was exactly the end that defendant had in mind when it took the necessary steps to attain it" (p. 59).

The subsidiary firms, with the exception of Valcourt Company, aided Eddy Match in the formation and operation of the monopoly, making it virtually impossible for any new competitor to enter the market anywhere in Canada. In the case of Valcourt:

> "The defendant served as a go-between, intermediary or agent to facilitate the purchase by the Eddy company of the other defendant corporations engaged in the same trade and the same commerce" (p. 59).

All five defendants were found guilty of being parties to the formation or operation of a combine detrimental to the public interest. The Eddy Match and Valcourt companies were each fined $25,000, the maximum amount prescribed by the Act. Commonwealth Match Company was fined $15,000 and the Canada Match Company and Federal Match were each fined $10,000, for a total of $85,000. The firms were also ordered to pay the costs of the prosecution in the same proportions as the fines.

Appeal

The defendants appealed against both the conviction and the sentence to the Quebec Court of Queen's Bench, whose ruling was made known on November 10, 1953. The appellants challenged the trial judgement on several matters of law.

Firstly it was contended that "formation" and "operation" of a combine are two distinct and alternative offences, as suggested by the language of the Act which speaks of "formation or operation", and that the appellants should not have been convicted on both parts (109 C.C.C. 10). The Court ruled that while a clear distinction was to be drawn between the two elements of the offence they were nevertheless two components of the same offence. The objective of section 32 was to prevent detriment to the public and to that end had prohibited any agreement, merger, trust or monopoly whose operation caused such a detriment or was considered likely to do so. It was a matter of indifference whether the detriment or likelihood of detriment arose from the formation or the operation of the combine (p. 11). Such combines are illegal in all their phases and it was not Parliament's intention to create two offences.

The appellants again questioned the nature and applicability of section 39A. The Appeal Court supported the trial judge on all points (pp. 12-13). To the plea that the manufacture, distribution and sale of wooden matches was not "a class or species of business" within the meaning of the Act, the Court responded that wooden matches were distinguishable from other lighting devices and pointed out that Eddy Match and three of its subsidiaries dealt in wooden matches to the virtual exclusion of other types of matches (p. 14). Valcourt did not manufacture matches, but its role as a holding company for all Eddy Match's corporate properties made it "the alter ego of its creator" (p. 15) and therefore could be said to be "engaged" in the same "class or species of business ..." as defined by section 2(b) of the Act.

The principal matter at issue for the Appeal Court to resolve was whether the appellants could be said to have "controlled" the match business between the years 1927 and 1950. It would be sufficient to show control existed at any time within the period. The Court ignored the brief tenure of Aurora and found Eddy Match to have been "alone in the field from 1927 to 1929. Between 1929 and 1940 competition was "sporadic" and all parties were acquired by Eddy Match by 1940. From 1940 until 1946 "the five appellants were completely alone in the field of wooden matches", a position which was renewed in June 1949 with the purchase of their sole competitor, and "continued right up to the end of the period covered by the charge" (p. 16). The years 1946 to 1949 merely saw a reduction in the dominance of the combine from a position of complete control to one of substantial control. During the entire period the importation of matches was "negligible" and "had no real influence on the wooden match industry in Canada" (p. 16).[7]

Throughout the period the five companies were controlled by the same interests and, while "they did not receive direct instructions in their daily operations ..." it was nevertheless the case that:

> "... all five appellants acted as a closely knit team; that they were under common direction and that their plans and operations were fully coordinated" (p. 17).

The appellants argued that by "control" was meant "monopolistic control", the power to exclude all others from the market. Since control was a central definitional ingredient of "merger, trust or monopoly" and Parliament had not defined "control", the Court attempted to do so and provided a rendition which would be seized upon by justices in future anti-combines cases.

> "When a group of companies engaged in the same business are alone in the field; when they work together as a unit; when they are free to supply the market or to withhold their product; when there is no restriction on the prices which they charge, save their own self-interest; when their freedom to exclude individuals as customers is restricted only by their interpretation of existing penal laws, then, by all normal standards, those companies are in control of the business in which they are engaged. The five appellants, at least during the period of 1940 to 1950 were in a position to do all of these things ..." (p. 18).

Another argument made in appeal centred on the words "has operated or was likely to operate ... to the detriment or against the interest of the public". In so doing the appellants argued that actual detriment referred to the past whereas the likelihood of detriment could refer only to future events, that is, circumstances subsequent to the laying of charges (p. 18). The Court ruled that both aspects of the criterion of proof referred to the period of the indictment and that it would be enough for the Crown to prove either; in the view of the Court both conditions had been satisfactorily shown to have existed (p. 19). Actual detriment therefore need not be shown, otherwise "or is likely to" is redundant. These words create a rebuttable presumption of the likelihood[8] of future public detriment (p. 21).

The appellants exercized a degree of control which "excluded for all practical purposes, the possibility of any competition" (p. 21). This creates a presumption that the consumer is being denied all he is entitled to in the way of free competition and this denial of the public right "is necessarily to the detriment or against the interest of the public" (p. 21). It is a presumption that may be rebutted but when one considers that competition was deliberately extinguished "the presumption of detriment becomes violent" (p. 21) and the onus of disproving the presumption lies with the defendants.

> "There is uncontradicted evidence that the leading actor - Eddy Match - deliberately set out to eliminate competition as it arose; that because of its strength and resources it was able to do so; that each new subsidiary was given its role and played its part in the general plan and finally, that the five appellants, all competition eliminated, were able to give to the public the products that they chose to make available, at the price they chose to fix and through the channels they chose to use" (p. 21).

Even if detriment could not be inferred from the fact of complete control, practices adopted by the members of the combine such as "fighting brands" and resale price maintenance, with refusal to supply as the penalty, leave no doubt that detriment resulted (pp. 23-24). The appeal from the conviction was therefore dismissed (p. 25).

On the matter of appeal against sentence the convicted companies argued that as components of one corporate entity they should not have been treated as autonomous units when sentenced, and that the total fine should have been no more than $25,000. The Court retorted that since Eddy Match had treated its subsidiaries as independent firms for the purpose of the combine, cumulative fines of $85,000 were appropriate. The Court also rejected appellants' plea that the order to pay costs was illegal; the Court found the judicial order justified in law.

Leave to appeal to the Supreme Court of Canada was denied on December 22, 1953 (p. 26).[9]

REGINA V. CANADIAN BREWERIES LTD.

Background

Since its incorporation in 1930 Canadian Breweries had conducted an extensive merger campaign in the brewing industry. By 1958 the company had purchased or controlled 37 brewing firms, 23 of them in Ontario. Six of the Ontario companies were closed down shortly after acquisition and six more were closed subsequently (126 C.C.C. 157). Canadian Breweries' share of the Ontario market consequently rose from 11 per cent in 1930 to 60 per cent in 1958 (p. 144).

In the same period the company's share of the Quebec market rose from 13 per cent to just over 50 per cent (p. 163). By the latter date Canadian Breweries also controlled 23.8 per cent (the largest single block of shares) in Western Canada Breweries Limited, itself a holding company owning or controlling five breweries with a large financial interest in four others. By 1958 the only serious competition came from Molson and Labatt, based in Quebec and Ontario respectively, each of which owed their dominant position to extensive merger undertakings (Sexton, 1963:20). By 1958 only two regions of Canada did not have a production plant belonging to one of the "big three" (Jones, 1967:554-555).

Nevertheless, by 1958 Canadian Breweries was the dominant market presence with over 40 per cent of the Canadian market (Rosenbluth and Thorburn, 1963:71). With the acquisition of National Breweries, a large multi-plant facility in Quebec holding 32.6 per cent of Quebec sales (126 C.C.C. 163), in March 1952 the Director of Investigation and Research, Combines Branch, initiated an investigation of the company's activities. His conclusions were duly laid before the Restrictive Trade Practices Commission early in 1954, whose report was published in June 1955 (Annual Report, Director of Investigation and Research, 1955-1956:9). For the first time a firm was accused of seeking market dominance by means of a deliberate plan of elimination of competition (p. 9).

The Commission found a "marked decrease" in competition (Lyon, 1963:159), illustrated by a decline in the number of brands of beer from 150 to nine since 1930. The Commission found this to be detrimental to the public interest. The Commission was also satisfied that Canadian Breweries' history of merger activity had not been prompted by consideration of scale economies.

> "The Restrictive Trade Practices Commission was of the opinion that the various acquisitions of rival brewing companies were made for the purpose of carrying out a deliberate plan for the closing, selling, or dismantling of most of the acquired breweries in order to eliminate competition" (Sexton, 1963:20).

However, the Commission rejected the Director's assertion that the company had substantial control of the industry, regionally or nationally, within the meaning of the Act. The presence of Molson and Labatt, the Commission felt, prevented Canadian Breweries from fixing prices unilaterally.

The company's merger activity was monopolistic and contrary to the public interest (p. 13), but its latest acquisition was not found to be a merger contrary to the Act. In the Commission's view a situation of "workable competition" had been arrived at which was not contrary to the public interest (Lyon, 1963:159). The company had not as yet acquired substantial or complete control of the beer market (Annual Report, Director of Investigation and Research, 1955-1956:16).

> "To allay its anxiety about the possible future expansion of Canadian Breweries, the Commission suggested that the company be prevented from acquiring, directly or indirectly, either the assets or the controlling interest in the capital stock of any of its competitors, and that it be prevented from

> entering into any agreement with any of its competitors, for the purpose of regulating prices or lessening competition" (Lyon, 1963:159).

Since a degree of competition remained, the Commission saw nothing to be gained in dismantling Canadian Breweries' assets, since the chief beneficiaries would be Molson and Labatt rather than the public. Entirely overlooked was the Director's contention that the present market structure made entry virtually impossible for firms without large capital (Sexton, 1963:40).

Despite the overall favourable tone of the report Canadian Breweries "after considerable delay" (Rosenbluth and Thorburn, 1963:71) was charged in 1959 with having been a party to the formation or operation of a combine (merger, trust or monopoly), contrary to Section 2(e) of the Combines Investigation Act, in the period March 8, 1930 to January 19, 1959 (126 C.C.C. 134).

> "Evidence ranged from Canadian Breweries' payment of excessive amounts for merged firms to substantial influence over price policy in the Ontario and Quebec segments of the industry" (Lyon, 1963:159).

Legal Arguments

The Crown's arguments would centre on the operation of the merger in Ontario (126 C.C.C. 146). The dominance of the accused was the result of an "artificial consolidation of various companies in the industry" (p. 140). A number of subsidiary firms, while not charged, were held to be implicated in the alleged offence (p. 135). The Court noted that this case, "based solely on the operations of the accused as a merger is the first of its kind ... in Canada", and the Court would have to look to section 411 of the Criminal Code for a body of jurisprudence relevant to the case (pp. 136-137).

The specific manner in which the merger was detrimental to the public interest was contained in the case particulars cited by the Crown. The defendant had implemented a plan for "the acquisition, closing, selling or dismantling of a great number of breweries" (p. 140), and by so doing had violated the public's right to free competition; the defendant had agreed or arranged with competitors matters pertaining to prices, quotas and other trade practices, a prerogative derived from the long series of mergers; the defendant had reduced the number of brands and chosen brand names likely to be confused with local trade names; lastly, the accused had helped to erect barriers to market entry (pp. 140-141).

The company's defence at trial was: (1) mergers were carried out with the approval of provincial authorities, (2) provincial control of the industry precluded the possibility of public detriment, (3) competition was to be had from Molson and Labatt in all matters other than price, packaging and distribution, which were regulated by the province of Ontario, (4) concentration of ownership was motivated by efficiency goals, (5) by some convoluted reasoning, the reduction in the number of independent brewers was held to mean more, not less competition (Lyon, 1963:159; Sexton, 1963:20).

Judgement

The case was heard in the Supreme Court of Ontario early in 1960 before Chief Justice McRuer, and judgement was given on February 8. The Court held that the purpose of combines law was the protection of competition, and "in the last analysis" the Act protects the public from enhancement of prices caused by combines (Reschenthaler and Stanbury, 1977:141). In the opinion of the Court the "chief evil" of monopolies was price increases (126 C.C.C. 167). The Court accepted that in Ontario prices were set by the Liquor Control Board (126 C.C.C. 150), and it therefore could be assumed that prices were set in the public interest. To rebut this assumption the Crown would have to show that the accused was able to impede that regulatory function (p. 167).[10] This ruling of law was derived from a review of some 40 criminal conspiracy cases since 1889, since no merger case could be found that was helpful.

The issue of intent was ruled inadmissible after the Crown argued that breweries were acquired for the purpose of shutting them down. Chief Justice McRuer responded:

> "I do not think it is an offence against the Act for one corporation to acquire the business of another merely because it wishes to extinguish a competitor. It is not the motive of the merger that is important, but what is important is whether it has operated to the detriment or against the interest of the public, or is likely to do so" (Sexton, 1963:27).

The Crown also contended that in order to determine whether the merger was likely to operate to the detriment of the public, the whole of the accused's activities prior to the Quebec merger were admissible in evidence, in order to show what the effect of the merger was likely to be in the future.

Chief Justice McRuer ruled that such evidence was inadmissible. Whatever detriment was shown to have resulted had to be shown to emanate from the particular merger in question, and not from other "collateral acts" which might be subject to other charges (126 C.C.C. 141).

This ruling was a reversal of the Eddy Match judgement. Sexton (1963) considers the Eddy Match case "adopted the more acceptable view" (p. 31).

> "Many facts for which the merger, itself, may not be responsible are nevertheless relevant to a consideration of the likely effects of the merger. If the section in the Act dealt only with the lessening of competition which "has operated to the detriment of the public" then the holding of the Beer case would seem quite sound, - but the words "or is likely to operate to the detriment of the public" appear in the Act and some meaning must be given to them. If this be so, then surely the prior acts of the accused are relevant in determining whether there is a likelihood of detriment occurring at some time in the future. Indeed, if these past actions are not relevant, it is difficult to comprehend upon what facts a finding of likelihood of detriment in the future could be based" (p. 31).[11]

In his deliberations Chief Justice McRuer referred to a 1957 Supreme Court ruling (Howard Smith Paper Mills: 118 C.C.C. 321) that an agreement to prevent or lessen competition was illegal when the prevention or lessening of competition agreed upon is such that "the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition" (Lyon, 1963:160). It was the "arrogation" of such power that was illegal, and whether the power was in fact used for anti-competitive ends was irrelevant. Once it was established such an agreement existed "to the point mentioned", the Supreme Court ruled, "injury to the public interest is conclusively presumed" (p. 161). The crucial question in the Canadian Breweries case, McRuer ruled, was the extent to which it had been agreed to prevent or lessen competition.

The Howard Smith Paper Mills case involved a conspiracy charge and, prior to 1960, all such cases were tried under the Criminal Code. The test of an illegal agreement was whether it prevented or lessened competition "unduly", and so, in effect, the Supreme Court was offering a definition of "unduly" only for conspiracy cases. In the Canadian Breweries case the issue was merger, the test for which under combines law was whether the merger or monopoly operated "to the detriment or against the interest of the public". Chief Justice McRuer ruled that the words "to the detriment or against the interest of the public" in the Act "had substantially the same meaning as the word unduly in the Code" (p. 161). Judge McRuer was thus ruling that for a merger to operate "to the detriment or against the interest of the public", it must function "virtually unaffected by the influence of competition". The merger must "so extinguish competition as to affect prices by monopolistic control", McRuer said (126 C.C.C. 161).

This ruling was contrary to the Eddy Match judgement, in which the judge rejected the defence counsel's argument that "substantially or completely control" meant "monopolistic control" (Sexton, 1963:33). The defence in the Canadian Breweries case argued that a monopolistic tendency must be evident.[12]

In assessing competitiveness, the Court gave inordinate attention to prices which were held to be a primary indicator of competitiveness. Since the Court was satisfied that the province of Ontario set prices, allegations of price fixing were irrelevant (126 C.C.C. 144-153). In other matters, such as quality, taste, services and packaging, the Court recognized competition "without restraint" (p. 168). The Court therefore rejected the Crown's contention that the public had suffered detriment in the disappearance of 141 brands of beer since 1930.

On this issue Sexton (1963:39) comments:

> "It would seem reasonable, however, that such vast reduction should create some sort of presumption at least that the public has suffered detriment. It would seem only fair that the defence should be made to show that the public has not suffered detriment".

Also rejected was the Crown's argument that merchandising practices and heavy spending on advertising served to exclude potential competitors from entering the market. Chief Justice McRuer ruled that the argument would only be valid for a "free market", and the brewing business was a "controlled market" (p. 39). This was based entirely on the Court's acceptance that beer prices were set by the province. Yet it is difficult to see why regulated prices should have any bearing on the level of advertising expenditure opted for by Canadian Breweries. The province regulated the means of advertising but not the amount, and it was the amount of national advertising that was alleged to constitute a barrier to entry.

> "The conclusion one must reach is that the Court has disregarded at least one factor of competition, - that is - the ease with which a potential competitor may enter the field" (p. 40).

The Court's finding was that the accused had failed to achieve a monopoly detrimental to the public in any particular province (126 C.C.C. 167). Plant closures in Ontario had not diminished the supply of beer and the accused faced "two strong, aggressive competitors" with 34 per cent of sales in 1958 (p. 158). In western Canada the defendant encountered the same competitors, while in Atlantic Canada local breweries possessed most of the market (pp. 165-167).[13]

In conclusion the Court put to itself the two questions it regarded as crucial in reaching a verdict.

> "Has it been proved beyond a reasonable doubt that the merger has conferred on the accused the power to carry on its activities without competition, or substantially without competition?" and:
>
> "Has it been proved beyond a reasonable doubt that the merger has conferred on the accused the power to control the market so that the provincial authority in the exercise of its duty in fixing prices cannot protect the public interest?"

The Court answered "no" to both questions and accordingly found the defendant not guilty (p. 168).[14]

REGINA V. BRITISH COLUMBIA SUGAR REFINING CO. LTD. AND BRITISH COLUMBIA SUGAR REFINERY LTD.

Background

Early in 1957 the Restrictive Trade Practices Commission completed a report on the sugar refining industry in western Canada. The industry came under scrutiny after British Columbia Sugar Refining in 1955 bought 40 per cent of the common shares of the Manitoba Sugar Company and later obtained a contract to operate the firm. While the Commission prepared its report the acquiring company obtained options to buy the remaining stock (Lyon, 1963:161-162).

British Columbia Sugar Refining was incorporated in 1890 and in 1934 opened subsidiaries in Alberta and Saskatchewan. By 1953 the company was the only supplier of refined sugar in British Columbia and Alberta and was "virtually without competition in Saskatchewan" (Sexton, 1963:21). In that year Manitoba Sugar had seven per cent of the Saskatchewan market and 51 per cent in Manitoba. The rest of the Manitoba market was shared by British Columbia Sugar Refining (19 per cent) and three major refineries in eastern Canada (30 per cent). The acquisition of Manitoba Sugar therefore ended competition in Saskatchewan and immediately gave British Columbia Sugar Refining a dominant position in Manitoba.

The Restrictive Trade Practices Commission was unable to find any history of predatory behaviour, but expressed concern about the merger since it gave the acquiring firm complete control in the three most western provinces and at least 70 per cent in Manitoba (Sexton, 1963:21).

The Commission found the sugar tariff was high enough to exclude foreign competition, so all Canadian needs were met by domestic producers. Protected by the high tariff, the refiners in western and eastern Canada had adopted a "basing point system" for pricing, whereby the price at delivery "was arrived at by adding the freight cost to any point from the refinery to the price at the refinery" (Sexton, 1963:21). The base points were Vancouver, Montreal and Saint John (129 C.C.C. 38). The price was naturally "maintained at the highest level allowable by potential competition of foreign suppliers" (Lyon, 1963:162). At the same time British Columbia Sugar Refining maintained a base price "just high enough to exclude competition from the East" (Sexton, 1963:21).[15]

The Restrictive Trade Practices Commission found that detailed information concerning base prices were exchanged between the western and eastern refiners (Annual Report, Director of Investigation and Research, 1956-1957:21). The pricing system was made less effective, however, by the presence of Manitoba Sugar which competed effectively and induced lower prices in eastern Saskatchewan, where the Manitoba company had a seven per cent market share. Acquiring the company would solve the western refiner's problem. The Commission recognized that the Manitoba Sugar Company had a competitive position in Saskatchewan and Manitoba, where British Columbia Sugar Refining and eastern refiners sought sales, "out of all proportion to its size in the sugar refining industry" (Lyon, 1963:162). The Commission noted that when competing products are homogeneous all suppliers play some part in determining price, including small firms. Rejecting the basing point system the Commission recommended that British Columbia Sugar Refining be required to supply all customers at the Vancouver base price and place it on the customers' transport free of charge (Annual Report, Director of Investigation and Research, 1956-1957:23).

British Columbia Sugar Refining offered a number of rationales for the takeover, including increased efficiency and an end to surplus, but the Commission felt these did not justify the merger (Annual Report, Director of Investigation and Research, 1956-1957:23).

> "The Commission concluded that British Columbia Sugar Refineries' control of Manitoba Sugar had the effect of eliminating price competition between the two companies, and that this was likely to reduce competition in Manitoba and Saskatchewan to a degree that would not be in the public interest. Significantly, for the first time in the history of Canadian anti-combines policy, the Commission asserted that 'the proposed merger should be renounced' and that if Manitoba Sugar were to remain independent, with no direct or indirect control over interest in it by any other Canadian sugar refinery, the public interest would be thereby best served" (Lyon, 1963:163).

On July 13, 1959 British Columbia Sugar Refining was charged under the 1952 Act on two counts of being a party to the formation or operation of a merger, trust or monopoly.[16] The trial took place in 1960. The defendant argued Manitoba Sugar was more efficient because of the takeovers. Judgement was delivered on August 8, 1960.

Judgement

Chief Justice Williams of the Manitoba Court of Queen's Bench held that under the Act it was insufficient to show that competition had been prevented or lessened; it must be shown that the merger gave the defendant the "power" of monopoly (129 C.C.C. 60). It was also necessary to show that illegal practices had operated or were likely to operate against the public interest. Unlike the Canadian Breweries case, which was otherwise found to be "of much assistance" (p. 13), Chief Justice Williams did not equate "unduly" in the Criminal Code with "to the detriment or against the interest of the public" in the Combines Investigation Act.

> "But despite this difference his decision essentially paralleled that in the Beer case, namely that competition must be virtually eliminated before a verdict of guilty is justified. He went further, however, holding that the government must establish excessive prices or profits, a requirement not met with in cases under the Code or the Act, and specifically overruled in several leading cases. There was no evidence, he added, that prices or profits were too high" (Lyon, 1963:163).

The court made no new finding of law, content to adopt almost entirely Chief Justice McRuer's rulings in the Canadian Breweries case. Price was again treated as the most significant gauge of competitiveness. There had always been competition and it had not been extinguished, since independent refiners were to be found in eastern Canada who might at any time enter the western market, given there were no economic reasons "except, perhaps, the effects of over-production to prevent them" (Reschenthaler and Stanbury, 1977:143).[17] All refiners were also potentially subject to foreign competition (129 C.C.C. 66).

Manitoba Sugar had had excess capacity for years, yet the eastern refineries were held to be "potential" competitors. No such competition had occurred in the past and the basing point system served to preclude it. Nevertheless, the court found competition existed and findings of fact cannot be reversed.

As in the Canadian Brewers case the trial judge offered a new interpretation of the Act. Chief Justice Williams ruled that not all combines were illegal but only those that "have operated, unduly, or are likely to operate unduly to the detriment or against the interests of the public ..." (p. 16). As in the Canadian Breweries case, "detriment" was "used in a legal sense and not in a social sense" (p. 16).

> "This point was repeated later in the judgement. With these words he effectively compounded the two tests. A merger must be shown to operate unduly to the public detriment!" (Reschenthaler and Stanbury, 1977:144).

In accordance with Chief Justice McRuer's ruling that public detriment must be shown to flow from the merger and not from accompanying acts pertinent to other charges, Chief Justice Williams declined to consider market sharing arrangements between the accused and eastern refiners, or the basing point system (129 C.C.C. 54, 41).

As to the possibility of future detriment arising from the merger, Chief Justice Williams said the whole method of operations of the accused had existed long before the particular merger which gave rise to the prosecution, and therefore had no bearing on that merger (p. 46).

> "What the Judge seemed to be saying is that if a wide variety of anti-competitive practices have been used in the past, and not challenged by the Crown, they cannot be cited as evidence of public detriment in a subsequent merger case since they do not flow directly from the creation of the merger. He reiterated this view when he noted that British Columbia Sugar Refineries had long enjoyed a monopoly in British Columbia and Alberta, yet '[T] here never seems to

> have been any objection to this situation although the Combines Act has been on the statute books since 1923. It would not be an unfair assumption that it was not considered that this situation so existing operated, or was likely to operate, to the detriment of the public, etc.'" (Reschenthaler and Stanbury, 1977: 145).

Failure to enforce the law in the past precludes its enforcement in the future. "A strange dictum for an offence for which there is no statute of limitations" (p. 145).

The issue of corporate intent was ruled inadmissible, as it had been in the beer case (129 C.C.C. 41-42).[18] The court also found the tariff to be irrelevant to the matter of the merger in question (129 C.C.C. 46). In the matter of the tariff, however, it was the presence of the high tariff that eliminated foreign competition and allowed domestic refiners to earn higher profits than would have been possible with a lower tariff or no tariff. The high profits were then used to eliminate domestic competition and to divide the entire country between four large producers, one in the West and three in the East. After that point profits were only restrained by a need to maintain the market division. Within eastern Canada the market was finely divided between the three dominant refiners. In the shelter of the tariff wall the Canadian market was "rationalized" to the benefit of a handful of companies. Without the tariff the basing point system would have been impossible and the accused in this case would have been in no position to bid for Manitoba Sugar in 1955. The Court ruled that allegations the accused took "full advantage" of the tariff were "unfounded in law" (p. 45) and that the defendant was entitled to full benefit of the protection offered (p. 47).

The Court found the accused not guilty on both counts on the grounds that the Crown had failed to prove beyond a reasonable doubt "that the merger in question destroyed or even limited competition, even in the area particularly in question" (Reschenthaler and Stanbury, 1977:145), or that the merger was detrimental either to beet sugar growers or the general public (129 C.C.C. 64).

Appeal Considered

The Crown filed leave to appeal on October 4, 1960, then withdrew the application partly because of the numerous findings of fact. The appeal was withdrawn on January 27, 1961[19] (Annual Report, Director of Investigation and Research, 1960-1961:14).

There were also tactical reasons for the decision not to appeal.

> "As the decision paralleled that in the Beer case, emphasized by sundry passages quoted from Chief Justice McRuer's decision, it too was a major departure from all leading cases on collusion under the Code, or the Code and the Act ... If the government had appealed, and the decision in the Beer and Sugar cases had been upheld, ultimately by the Supreme Court, the merger provisions of the Act would have become all but dead letters. Possibly the administration felt that its role as watchman of merger practices would be served better by not appealing: higher courts might have expressed merger policy in a way that the government did not want. The Beer and Sugar cases, however, gave a green light to prospective mergers, unless they were to terminate in a monopoly or were intent on becoming a monopoly, and so the decisions were fatuous from a legal point of view" (Lyon, 1963:165).

Aftermath

In the light of these judgements the Justice Department adopted a much more cautious approach to merger and monopoly cases, electing instead to employ negotiation as the chief enforcement tool through the Program of Compliance; this in a decade of "rapidly rising foreign and domestic mergers in Canada" (Reschenthaler and Stanbury, 1977:148). The Director made it clear, however, that the "virtual monopoly" test would not be accepted as the definitive word on mergers (p. 147). For one thing, the 1960 amendments to the Act now defined "merger" and "monopoly" separately. Whereas monopoly was still illegal when "the combination ... has operated or is likely to operate to the detriment or against the interest of the public", mergers were now prohibited when "competition is or is likely to be lessened to the detriment or against the interest of the public" (p. 150).

A problem with the new merger test was that the courts had never clarified what "competition" meant, and in the beer and sugar cases of 1960 the courts adopted a simplistic measure by which the absence of competition was chiefly signalled by "exorbitant prices".

> "It is submitted that the courts' preoccupation with price has hindered a proper development of any clear concept of the meaning of the term "competition". Since the basis of the whole combines legislation is the idea of competition, it would seem that a prerequisite to clarity of thought in combines cases would be a comprehensive definition of competition" (Sexton, 1963:41).

The beer and sugar cases also highlighted obstacles to successful prosecution in the rules of evidence.

Lyon (1963) argues that more attention should be given to the potential growth pattern of the merged firm and the consequences for entry into the industry, when evaluating the likely competitive impact of particular mergers.

> "The recent Beer and Sugar cases illustrate such a flexible interpretation of the law that one begins to question its raison d'être ... While the burden of proof should be on the merger to show that the public interest has been served, increased efficiency, economies and productivity should be weighted heavily, tempered by practical considerations of accessibility of new firms into the industry, in the determination of future merger investigations by the Commission and the courts" (p. 182).

Another aid to prognosis is intent. When ascertainable, intent will indicate whether a merger is likely to operate to the detriment of the public, and a reliable method of discerning corporate intent "is to study the actions of both companies prior to the merger" (Sexton, 1963:49).

REGINA V. ELECTRIC REDUCTION CO. OF CANADA LTD. (ERCO)

Background

This case arose from an inquiry by the Director of Investigation and Research and, subsequently, an investigation by the Restrictive Trade Practices Commission which submitted its report to the Registrar General on November 30, 1966. The report was made public on December 28 of that year. The Electric Reduction Company (ERCO), the sole manufacturer of phospherous chemicals and industrial phosphates from 1956 to the time of the inquiry (McFetridge, 1974:5), was a subsidiary of the British chemical group Albright and Wilson (Annual Report, Director of Investigation and Research, 1966-1967:25).

The Director in his submission to the Commission argued that ERCO was a monopoly which had used its "market power with the intent and purpose of eliminating competition and excluding competition ..." and that ERCO's acquisition of Dominion Fertilizers Ltd., a manufacturer of agricultural phosphates, in 1959 was a merger detrimental to the public interest (p. 25). The Commission pointed out that agricultural phosphates were not protected by tariffs (although industrial phosphates were subject to a duty of 20 per cent: McFetridge, 1974:5) and that ERCO faced domestic competition and also potentially competition from abroad.

> "The Commission found that ERCO had acquired Dominion Fertilizers Ltd. to maintain its position as the sole Canadian manufacturer of detergent phosphates and other industrial phosphates" (Annual Report, Director of Investigation and Research, 1966-1967:25).

Dominion Fertilizers had "revealed its intention to build a plant for the manufacture of phosphoric acid for use in making fertilizers and industrial phosphates ..." not long after ERCO had made known its plans to make agricultural phosphates. ERCO believed that a competitor obtaining a sizeable share of the agricultural phosphate market "would be in a position to manufacture industrial phosphates ...", and indeed would be compelled to in order to make the whole operation financially sound (p. 29). In ERCO's judgement two producers could not be accommodated in the Canadian market. At an ERCO board meeting in April, 1959 it was decided to try and purchase the assets of their only competitor. The acquisition removed an immediate threat to ERCO's monopoly position and the benefits accruing from it, such as differential pricing for large and small customers. Eighty per cent of ERCO's sales went to three large firms, Colgate-Palmolive, Proctor and Gamble and Lever Brothers, who, because of their near-monopsony status, and their access to United States phosphates, were protected from monopoly abuse by ERCO. The remainder of the market was made up of 20 small manufacturers with whom ERCO exercised control, a prerogative threatened by any market entrant. ERCO's practice was to charge the lowest price to the three large buyers and the highest prices to the smaller firms.[20]

> "... ERCO was a tariff protected monopolist fully exploiting its position vis-a-vis its smaller domestic customers but being held, in all likelihood, to a price no greater than average total cost by its major customers" (McFetridge, 1974:7).

The Restrictive Trade Practices Commission highlighted other strategies by which ERCO sought to preserve its monopoly. A firm named Cyanamid Corporation had supplied Dominion Fertilizers with phosphate rock and sulphuric acid. By undertaking to purchase quantities in excess of those received by Dominion, ERCO hoped to dissuade Cyanamid from embarking on industrial phosphate production. After meetings in England between the respective parent companies an agreement on this basis was reached. Albright and Wilson instructed ERCO to work out the details with Cyanamid and two other potential competitors "which would make all of them happy and keep all of them out of our business"

(Annual Report, Director of Investigation and Research, 1966-1967:29).[21] These agreements "flowed directly" from ERCO's merger with Dominion Fertilizers (McFetridge, 1974:7).

Another source of trouble for ERCO was Standard Chemical Ltd., who set up sodium chlorate production in Canada at a time when prices "were sharply reduced by the aggressive competition of a large western European producer, Pechiney, in 1958 and 1959" (Annual Report, Director of Investigation and Research, 1966-1967:25). Standard Chemical proved to be accommodating, however, informing ERCO that they would compete only on quality and service. French and American actual and potential competition, the Retrictive Trade Practices Commission reported, kept prices "at a reasonable level" in Canada but the public interest would have been better served "by unrestricted competition between ERCO and Standard" (p. 25). The evidence heavily suggested an agreement by which Standard adopted ERCO's prices.

ERCO also hoped to avoid foreign competition by opting out of markets abroad in which competitors were active.

> "As a matter of policy, the Commission found ERCO avoided competition of any kind in the American market in order to forestall retaliation in the Canadian market by any manufacturer of chlorate in the United States" (p. 26).

The policy appears to have been successful; a Niagara manufacturer "refrained from offering chlorate in Canada ..." (p. 26). ERCO also avoided the Australian and Finnish markets where Pechiney was strong, in view of Pechiney's efforts to set up production in North America. An agreement had been reached in the United States between Pechiney and Albright and Wilson whereby the former could import an agreed amount of sodium phosphate without reducing prices. ERCO opposed a similar agreement for Canada. Inter-corporate meetings resumed, during which ERCO reduced its prices and "by the end of 1960 the threat of imports of further Pechiney chlorate into Canada had practically disappeared" (p. 27). ERCO also used long-term contracts with large customers and reduced prices to smaller clients in local markets threatened by competition. The merger with Dominion Fertilizers had been the chief means of protecting ERCO's monopoly and all subsequent agreements were possible because of it. This merger, in the opinion of the Commission, "was detrimental to the interest of the public" (McFetridge, 1974:7).

The Minister of Justice agreed and ERCO was indicted on one charge of merger and four of monopoly in October, 1967. After several postponements, partly because of illness of counsel, the trial opened in the Supreme Court of Ontario on January 12, 1970, before Mr. Justice J. Stark.

Judgement

On the opening day of the trial the accused pleaded guilty to the merger charge and two of the monopoly charges, while pleading not guilty to the remaining two monopoly counts. In view of the guilty pleas these latter charges were dropped by the Crown. The company was then convicted on three charges, all of which referred to industrial phosphates in the period 1956 to 1966. This was the first conviction for a merger offence in the history of the Combines Investigation Act, first legislated in 1910[22] (McFetridge, 1974:2).

> "Held, a company in a favoured monopolistic situation must expect to conduct its business carefully if it is not to restrict competition unfairly and unduly and thus harm the public and its customers" (61 C.P.R. 235).

The Crown requested a fine and an Order of Prohibition. The Court complied, fining ERCO $20,000 on the merger charge and $10,000 each on the monopoly counts (p. 236).

The Court noted that the Supreme Court of Canada had long ago decreed[23] that "as a rule" an agreement having as it's objective a "virtual monopoly" by eliminating competition was illegal under the Act. In so doing, Mr. Justice Stark remarked, the Supreme Court was saying "that free competition is best and ... that economic doctrine has been the basis of the law of Canada ..." (p. 236).

The Court made it clear that the offence lay not in merger and monopoly per se, for a monopoly may arise from fortuitous circumstances. Nevertheless:

> "... it must be clear to any businessman or business company which finds itself in a monopoly situation that in that case especially strict standards of conduct are required and must be met in any such business, and they are not entitled to protect and preserve that monopolistic situation by unfair means, by buying up all existing competition, by entering into agreements and arrangements so that situation of monopoly can be preserved at all costs" (p. 237).

In passing sentence the Court acknowledged that in combines cases fines have on the whole been very small, relative to the party's financial capacity", and that imprisonment had never been imposed. The modest fines could only be explained:

> "... in terms of a kind of implicit judicial view which regarded anti-combines violations as being of somewhat lessor order of gravity than the commission of one of the so-called common crimes" (p. 237).

The total fine of $40,000 was, "if anything, too lenient" but the Court found excuse for leniency:

> "... if for no other reason that in this case there is a novelty about it. There have not been very many of these cases brought before the Court and perhaps it is unfair to endeavour to fall at this time too heavily on this particular offender" (p. 238).[24]

There was also the Order of Prohibition, the first time such an order had been levied in a merger and monopoly case (Annual Report, Director of Investigation and Research, 1969-1970:52).

> "The Order specifically prohibits, inter alia, any arrangements with competitors, or potential competitors, relating to the selling price of industrial phosphates to third parties, to the allocation of customers or markets, to the purchase by third parties of raw materials used in the production of industrial phosphates and to the determination of delivery charges. In addition the Order requires this corporation to make available to any customer or potential customers its current pricing schedule for industrial phosphates, showing the full range of prices and it limits the spread between the highest and the lowest price which this corporation may charge" (pp. 51-52).

The Order also prohibited ERCO from obstructing entry by competitors into manufacturing, producing or supplying of industrial phosphates. For the next 12 years all contracts, agreements and arrangements entered into by ERCO for the supply of sodium tripolyphosphate were to be for no more than one year duration (p. 52). When existing contracts expired prices had to conform with a given schedule, and this would hold for 10 years unless ERCO could show competition existed in the market or some other reason why the provision should be rescinded.

It must be asked why ERCO elected to plead guilty to a majority of charges rather than compel the state to prove them guilty by means of a statute regarded by Crown counsel with some misgivings since the acquittals of Canadian Breweries and British Columbia Sugar Refining Co. Ltd. in 1960.

McFetridge (1974:8) sees the outcome as largely self-explanatory.

> "The entry of a guilty plea by ERCO is not surprising ... the merger extinguished domestic competition and facilitated reciprocal arrangements which precluded the entry of others. There is a distinct likelihood that the application by a trial court of the beer-sugar precedent would have resulted in a conviction.[25] This case did nothing to resolve the legal arguments as to whether a merger resulting in anything less than a monopoly violates the Act. The importance of this case lies instead in the assessment by the prosecution of the costs imposed by the merger on the Canadian economy and in the choice of methods by which these costs were to be reduced".

WEE FOLKS DIAPER SERVICE, ET AL.[26]

Background

The Director's Annual Report for 1970-1971 states that the Director received "numerous complaints" from the Montreal area in 1968 and 1969[27] concerning three businesses engaged in the transportation and supply for babies' cotton diapers. The three firms were the Wee Folks Diaper Service Inc., ABC Diaper Service Inc., and Baby's Diaper Service Reg'd. (p. 48). The three were alleged to be in virtual control of the supply of diapers to hospitals in the Montreal area.

Adjudication

The Director investigated, during which documentary evidence was obtained and was forwarded to the Attorney General. The annual report continues:

> "It was decided that an Order of Prohibition be sought under section 31(2). Proceedings were commenced in the Exchequer Court of Canada, in the fall of 1970, alleging that the three defendants had done acts or things constituting, or directed towards, the commission of a monopoly offence, contrary to section 33 of the Act and requesting an order containing both general and specific prohibitions so as to encourage the entry of new competition in the market. On February 10, 1971 Mr. Justice Dumoulin, issued in Montreal, an Order substantially in the form requested" (p. 48).

In general terms the Order prohibited the companies from doing anything to facilitate the operation of a monopoly in the city of Montreal and District. Specifically the three firms were forbidden to: (1) restrict entry of actual or potential competitors into the diaper supply business, (2) restrict or prevent customers having access to names and/or addresses of actual or potential customers or related information available from hospitals, or advertising space in media distributed in hospitals, (3) stating or implying that materials and methods used by competitors are or are likely to be hazardous to customers, (4) imposing or proposing restrictive conditions or agreements with competitors, (5) altering prices for the purpose of preventing, limiting or substantially lessening competition (unless done to meet competitors' price changes or the cost of doing business and providing the new prices affect all customers equally), (6) attempting to acquire or obtain control of any actual or potential competition for the next four years.

ANTHES IMPERIAL LIMITED

Background

This matter arose from the Director of Investigation and Research's concern that Anthes Imperial Limited (Anthes), the dominant manufacturer and supplier of cast iron soil pipe in the Prairies and based in St. Catherines, Ontario, between January, 1952 and June, 1965 constituted a monopoly from the Lakehead region in Ontario to Alberta and that this monopoly operated to the detriment of the public. The Director also charged in his submission to the Restrictive Trade Practices Commission that the company had sold pipe fittings at "unreasonably low prices", beginning in July, 1963, "having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such an effect" (Annual Report, Director of Investigation and Research, 1967-1968:35).

The Commission found Anthes to have been in "substantial or complete control" of the market from the Lakehead to Alberta. Sales by the company had increased from 72 per cent of total domestic sales in 1960 to 92 per cent in 1964. The principal competitor, Dominion Foundry Limited of Winnipeg (Dominion), received a substantial portion of its supplies from Anthes and sold from the same price list which allowed Dominion, with higher production costs, only a narrow margin of profit (p. 35). Nevertheless, these prices were higher than in other regions of the country.

Other firms offered only minor competition. S.P. & F. Foundry Limited of Vancouver (S.P. & F.) sold small amounts in Calgary and Edmonton but at competitive prices, which included tenders to the City of Calgary. S.P. & F. were viewed as serious competition by Anthes and in 1961 when S.P. & F. negotiated with Canadian Pacific Railway for its Ogden Shops as a site for a soil-pipe factory, Anthes:

> "made strong representations ... with the object of discouraging the sale and thus foreclosing the competition of S.P. & F. The Calgary project of S.P. & F. was not realized" (p. 35).

The Commission found this manoeuvre by Anthes to be abuse of market power to maintain their dominant position, regardless of whether S.P. & F.'s withdrawal was due to the Anthes initiative or not. Anthes' initiatives in this regard "were clearly an example of its use of its dominant position in an attempt to impede the possible entry of a competitor" (p. 35). The Commission also found the price conformity of Dominion not to be in the public interest.

In 1963 the higher prices in the Prairies maintained by Anthes' dominance attracted two competitors, Thor Foundry Limited of Winnipeg (Thor), and General Foundry Works Limited of Edmonton (General). Thor had been selling in Regina at prices lower than Anthes, while General was a new buiness which sold at prices equal to those of Anthes but offered quantity discounts on smaller orders (p. 36). In addition there were rumours of a third foundry starting up in Calgary. Alarmed by these developments, Anthes embarked on a price cutting strategy of 15 per cent on most fittings, but on two items reduced prices by 36.4 per cent and 37.5 per cent respectively. Thor and General responded by bringing their prices or discounts below that of Anthes, while Dominion reduced its prices to those of Anthes (reducing its margin still further). As a result of the price cutting Dominion went bankrupt in 1964 while General reduced its prices again in that year and succeeded in selling its entire production throughout the period. The remaining competitor, Thor, eventually transferred out of the cast iron pipe market.

The Commission noted that competition from these sources was good only for small orders and a limited range of fittings, Anthes remaining "the sole source of large quantities of soil pipe and fittings delivered to a wholesaler's warehouse or to a job site" (p. 36). Anthes was subsequently able to recover its profit margin by adopting more mechanized production methods.

It was this price cutting episode in 1963 that the Director had objected to. The Restrictive Trade Practices Commission, however, found the price reductions not to be unreasonable, given the high prices which had prevailed heretofore. Even the 36.4 per cent and 37.5 per cent cuts were acceptable since these items had been selling at "an unusually high margin" (p. 36).[28]

More troubling to the Commission was its finding that Anthes had always abstained from selling in British Columbia, a market "belonging" to Associated Foundry Limited of Vancouver (Associated), which for most of the period 1958 to 1962 had operated at a loss, and to S.P. & F. In return Anthes did not welcome competition from British Columbia (p. 37). In December, 1962 Associated purchased S.P. & F. thereby gaining control of the whole market in that province. Shortly after this, Associated abandoned discounts and "substantially increased prices" (p. 37). In May, 1963 Anthes acquired a one-sixth share of the merged company and increased its holding to one-fifth in December, 1964 (pp. 36-37). Anthes obtained representation on the board of Associated and thereby "exercised an influence on its sales and distribution policy" (p. 37). The Commission did not object to Associated's acquisition of S.P. & F., since the latter was thought likely to cease production due to its outmoded technology, while Associated had recently modernized. Also, the Commission saw no barriers to entry into the British Columbia market.

Even so Anthes had never offered competition, preferring by its purchase of 20 per cent of Associated to enter the British Columbia market in alliance with Associated, a move which the Commission regarded as a "merger detrimental to the public" (p. 37). Consumers in British Columbia and Alberta, the Commission felt, would have benefited from competition between the two firms. The Commission recommended that Anthes divest itself of its 20 per cent holding in

Associated (Anthes did so shortly after the Commission's report was published) and that the two firms "refrain from arrangements restrictive of competition in the manufacture and distribution of cast iron pipe and fittings" (p. 37). The Commission also recommended a minimum weight standard for soil pipe similar to that of the United States, in order to open the Canadian market to American imports and changes in the import duty (of 12 per cent) if necessary (p. 38).

Adjudication

The Commission's report was submitted to the Minister of Consumer and Corporate Affairs on October 10, 1967, and made public on November 7 of that year. The matter was then referred to the Attorney General of Canada who alone can order a criminal prosecution. Despite the strength of the case "the Crown refused to prosecute on what appeared to be good evidence of both merger and monopoly ..." (Gorecki and Stanbury, 1979:166) and opted instead for an Order of Prohibition. The Order was delayed while a Supreme Court ruling on another case was pending[29] (Annual Report, Director of Investigation and Research, 1971-1972:29). Following resolution of that case an Order of Prohibition was instituted by the Federal Court on February 22, 1973.

> "The Order prohibits Anthes from acquiring any control over or interest in Associated and from behaviour directed towards the offences of merger and monopoly. It requires Anthes to license competitors to manufacture mechanical joints on terms no more onerous than those specified in an annexe to the Order" (Annual Report, Director of Investigation and Research, 1972-1973:47).

CANADA SAFEWAY LIMITED

Background

Public suspicion about the food retail industry extends back at least to 1959 when the then Director, T.D. MacDonald, subsequent to the Diefenbaker government's Commission on Food Price Spreads, launched an inquiry. The investigation was conducted by a single researcher and was never completed. Nevertheless in the 1963 Annual Report MacDonald's successor, D.W. Henry, reported that "a critical degree of concentration did not exist in any market ..." (Mitchell, 1975:176).

Public concern continued through the 1960's. A joint committee of the House of Commons and Senate in 1966 said 75 per cent of the urban grocery business was controlled by five supermarket chains. In 1967 the committee recommended a broader study, but the Director in the Annual Report of that year retorted that such an undertaking was "beyond the capacity of a staff of the size and character now available to the director" (p. 177).[30]

There was particular consumer dissatisfaction in western Canada. The Royal Commission on Consumer Problems and Inflation (Batten Report), set up by the governments of Alberta, Saskatchewan and Manitoba, in 1968 concluded that up to 75 per cent of the market in some prairie cities was in the hands of the Dominion, Safeway and George Weston chains and that this share was increasing by one per cent annually. The consequences were high profits, excess capacity and saturation advertising (p. 178). The Commission criticised the regulatory record and called for an immediate investigation and stronger legislation. Mr. Henry, who saw his mandate in terms of winning the confidence of business rather than prosecuting them (p. 180), responded with a standard phrase found ad nauseam in the annual reports; "the evidence did not justify the commencement of an inquiry under the act" (p. 179). Three years later the Director was reporting Statistics Canada figures, showing increased concentration in the food retail industry in western Canada in the period 1958 to 1968 (p. 180).

Adjudication

The case officially dates from 1966 when a file was opened (Gorecki and Stanbury, 1979:166) but is only officially acknowledged in the Annual Report of 1972-1973. There it is reported that an Information was laid on October 11, 1972 containing two counts of monopoly, charging that Canada Safeway Limited in the period January 1, 1965 to October 10, 1972 "was a party to a monopoly in the grocery retailing industry, which monopoly has operated or is likely to operate to the detriment of the public" (p. 47).[31]

The first count related to Calgary and the latter to Edmonton. The preliminary inquiry was set for September 17, 1973 but on that date the Attorney General of Canada applied in the Supreme Court of Alberta for two orders of prohibition restraining Canada Safeway from "those policies and practices ... which, in the alternative, would have been the subject of a trial" (Annual Report, Director of Investigation and Research, 1973-1974: 32). The defendant consented to the procedure in order "to avoid lengthy and expensive litigation" (14 C.C.C. (2d.) 14).[32] The Court agreed to impose the orders and the criminal charges were then withdrawn.

In imposing the orders on October 5, 1973 the Court pointed out that it was not necessary, as a condition, to find that the accused had committed the offences with which it had been charged; only that "the party has committed acts, which if unrestrained, will probably, at a later date, constitute an offence under the Act" (p. 18). The accused, while agreeing to the terms, denied culpability as to the monopoly charges.

The procedure was at the discretion of the courts in considering the circumstances of each case and "in the interests of justice and prudence" (p. 19). The Crown pointed out that excessive profits were not an issue here, but efforts to limit the expansion of competitors and to prevent the entry of new competition. In the opinion of Crown counsel the prohibition orders:

> "... would afford immediate and effective relief in Calgary and Edmonton whereas a trial would involve some 800 witnesses, and approximately 9,000 documents, with the prospect that the final determination might not be known until perhaps 1975" (p. 21).[33]

The Crown also indicated that new evidence which had recently come to the attention of the prosecution suggested that Safeway's market shares in the two cities were not as large as had been supposed when a motion for trial had been entered in October, 1972, and that in a monopoly prosecution "the market share is naturally an essential element in establishing guilt" (p. 21).

The terms of the two orders were identical. Canada Safeway was prohibited from: (1) for the next six years from the date of the orders, charging prices for the purpose of meeting or undercutting competition, unless the price charged for an item was the same in all of its stores,[34] (2) significantly increasing floor space in its current stores or opening more than one new store in each of the two cities in the next three and one-half years. Safeway was forbidden from acquiring new sites in the first two and one-half years of this period and from opening more than two retail outlets in the one year following the end of the longer period. This was intended to allow the development of competition (Annual Report, Director of Investigation and Research, 1973-1974:33), (3) in its real estate operations, entering into restrictive agreements or clauses when leasing retail space "designed to prevent competitors from opening stores in the vicinity, which would be in competition with the defendant" (14 C.C.C. (2d.) 22), (4) acquiring stores from competitors for a five-year period, (5) engaging in "market saturating advertising policies" for a period of five-years.

FOOTNOTES

1 These "fighting brands" were instituted solely for the purpose of driving competitors into bankruptcy by forcing them to compete with products priced at less than cost, but only in market areas in which competition existed. When competition ceased the "fighting brands" were withdrawn and Eddy Match products replaced them at "regular" prices (109 C.C.C. 23).

2 The Commissioner's title changed to that of "Director of Investigation and Research" in 1952.

3 It is not clear why it was decided to proceed with only one of the four charges. The only reference to the matter in the Commissioner's annual reports, after stating the trial verdict and the defendant's intention to appeal, states: "Since questions of law which are also applicable to the remaining charges have been raised in the appeal, these charges are not being proceeded with pending the outcome of the appeal" (Annual Report of the Commissioner of the Combines Investigation Act, 1951-1952:15). The appeal was denied in 1953 but no further action was taken on the outstanding charges and the annual reports of the next several years contain no reference to the matter.

4 Given that virtually all anti-combines cases lean heavily on corporate documentation, few cases would be prosecutable without section 39A which was passed in 1949, and may explain why only one merger/monopoly prosecution was (unsuccessfully) carried out prior to this case. Equally indispensable was the power of combines investigators to search business premises and seize documentary evidence, a prerogative which is now curtailed since the Supreme Court ruled in 1984 that the authorization under section 10(3) of the Combines Investigation violated section 8 of the Charter of Rights and Freedoms (Maclean's, October 1, 1984:68).

5 Proper methods cited by the Court were: excellence of product, low selling price, management efficiency, marketing acumen and advertising (104 C.C.C. 58).

6 Instances of improper methods were given as: selling at less than cost, paying an exorbitant sum for a competitive facility and then abandoning it, and purchasing supply in amounts far greater than is likely to be needed (104 C.C.C. 58).

7 In his report in 1949 the Commissioner of the Act pointed out the role of customs duties in protecting

the combine from international competition. According to the Commissioner's annual report of 1951 duties on wooden matches were subsequently reduced from 17½ per cent and 20 per cent to seven and one-half per cent and 10 per cent, effective June, 1951 (Annual Report, Commissioner of the Combines Investigation Act, 1950-1951:8-9). However, Stanbury (1976:576) reports that no tariff has ever been reduced by order of Cabinet despite 11 reports by the Restrictive Trade Practices Commission favouring cuts and the Commissioner/Director's recommendations for tariff reductions.

8 The Appeal Court interpreted "likelihood" to mean "probability" rather than "possibility" although the case did not require the Court to make a ruling on the matter (109 C.C.C. 19).

9 Rosenbluth and Thorburn (1963:68) remark: "The fines were low in relation to the company's profit, the monopoly was not dissolved and no order of prohibition was issued. It may therefore be assumed that monopoly control continues". The companies clearly made an inestimable sum in excess profit during the 23 years of the indictment, against which the $85,000 fine would appear negligible.

In fact following the refusal of leave to appeal to the Supreme Court the Minister of Justice sought legal advice as to the possibility of an Order of Prohibition and the dissolution of the monopoly (Annual Report, Director of Investigation and Research, Combines Investigation Act, 1953-1954:29-30). The advice received was that legal provision for such an initiative had not been legislated until 1952 (after the conviction), and therefore "such an application was not authorized by it" (Annual Report, Director of Investigation and Research, Combines Investigation Act, 1954-1955:29).

If the illegal aspects of the monopoly continued in fact, or were resumed subsequently, there seems no reason why the monopoly should not have been dissolved. Whether the necessary evidence was attained would depend on what kind of follow-up, if any, was carried out. The Director of Investigation and Research has assured the public (Annual Report, 1954-1955:29) that his department "has continued to keep the industry under observation ...", but no further evidence of this is to be found in the annual reports which follow. Like the matter of the three outstanding criminal charges, the issue of monitoring remains ambiguous due to what could be interpreted as self-serving reticence on the part of the regulators.

10 The Court's acceptance that prices were set by provincial regulatory authorities was crucial to the outcome

of the trial, given the Court's view that price was the chief gauge of competitiveness. Jones (1967:552) disputes this view, asserting that prices were "covertly set on a joint profit-maximization basis by the brewers". The author argues that in Ontario the regulatory board had no legislative authority to fix prices or to investigate price increases and that retail prices in the province were simply a mark-up of the brewers' wholesale price. The public interest was therefore not protected and consequently profits were "extremely high" (p. 567). Early in the merger program E.P. Taylor, the owner of Canadian Breweries, had written: "I am sure that we now have the power to control prices and sales practices of the industry ..." (Annual Report, Director of Investigation and Research 1955-1956:10). The Restrictive Trade Practices Commission had concluded that the brewers "had a definite say in the pricing of beer" (p. 15).

The Court accepted there was less regulatory control in Quebec where prices were negotiated between the associations of brewers and tavern keepers and then forwarded to the Quebec Liquor Commission. For the only price change between Canadian Breweries' takeover of National Breweries and the trial the Commission accepted the price submitted to them by the industry (126 C.C.C. 164-165).

11 Sexton (1963:32) points out that the evidence was forwarded not to prove additional offences but to substantiate the charges in question. He also notes that American jurisprudence admits such evidence (and also makes illegal the deliberate elimination of competition by merger).

12 Sexton (1963:35) argues that in the legislation prior to 1960, under which Canadian Breweries was tried, subsection 2(e)1 referred to mergers, and the point at which a merger became illegal was something less than virtual monopoly, while subsection 2(e)2 referred to monopoly; subsection 2(e)1 referred to acquisitions, 2(e)2 to situations in which a corporation attained dominant market status by means of competitiveness and internal growth. In each case detriment or likely detriment had to be established as fact for a conviction. Chief Justice McRuer's ruling that a merger conviction required the Crown to prove a virtual monopoly existed made subsection 2(e)2 redundant.

13 The Court's finding that aggressive competition emanated from Labatt and Molson was facilitated by the ruling that anti-competitive effects "must be shown to flow from the merger and not from collateral acts which might have been the subject of another charge, and which might have been committed by the corporation qua corporation,

whether it was a merger or not" (129 C.C.C. 141). By ruling out of contention all evidence suggesting collusive behaviour between the "big three", the Court was able to regard them as competitors.

14 This case and other judgements which follow have been criticized for what is seen as a narrow legalistic perspective devoid of economic analysis (Jones, 1967: 551; Phillips, 1964:87-90; Rosenbluth and Thorburn, 1963:103). The Restrictive Trade Practices Commission, set up in 1952 "seemingly with the intent of making some assessment of economic effect" (Phillips, 1964:89), did not fulfil its mandate in that regard in its investigation of the brewing industry, confining itself to an evaluation of the evidence presented by the Director of Investigation and Research (Rosenbluth and Thorburn, 1963:103).

In place of a legalistic assessment, a case-by-case economic evaluation of the likely consequences of a proposed merger, with obligatory notificatory requirements by all parties, has been called for (Jones, 1967: 551-552; Phillips, 1964:94). Past market performance and changes to market structure would be major considerations. By such criteria mergers which increased market power without substantive economies of scale would be judged detrimental to the public interest. In light of this "unreasonable market power ... exists in brewing" (Jones, 1967:552) in that all three major brewers enjoy market power largely attributable to successive mergers. The consequence has been excess capacity, static demand and absence of scale economies (p. 562).

15 The price increased at each point eastward from Vancouver until a "dividing line", roughly in eastern Saskatchewan, was reached, after which the pricing system based at Montreal governed. This system of "delivered prices" allowed Canadian Sugar Factories, wholly owned by British Columbia Sugar Refining and with a refinery at Raymond, Alberta, to sell "at the highest possible price at every point in the province without regard to the actual cost of shipping sugar from the Alberta factories" (Annual Report, Director of Investigation and Research, 1956-1957:20).

16 On the first count British Columbia Sugar Refining was charged with its holding company, British Columbia Sugar Refinery Limited. On the second count these two firms were charged in conjunction with a number of subsidiaries in the Prairie region (129 C.C.C. 8-10).

17 Once again the limitations of legalistic versus economic analysis are apparent; an economist would find overproduction, a feature of the industry, a sufficient reason why eastern refiners stayed out of the western

market (Reschenthaler and Stanbury, 1977:143).

18 The Crown's case was built entirely on 590 documentary exhibits, but much of the contents relevant to the issue of intent and other aspects of the alleged guilt of the defendant were ruled to be merely "opinion" (129 C.C.C. 59).

19 In an unusual development, the Appeal Court ordered the Crown to change the wording of the notice of appeal, which Chief Justice Williams had found "personally insulting" and "which none of the judges recognized as language lifted from a judgement of the Privy Council". The "demonstrated hostility of the Appeal Court" was one reason for the withdrawal of the appeal (Reschenthaler and Stanbury, 1977:145, fn.).

20 The price charged small customers was "equal to the list price of the nearest United States mill, plus freight from that point, plus the twenty per cent Canadian tariff. This was the maximum ERCO could extract from any Canadian buyer. This pricing strategy is not uncommon among firms in the more concentrated sectors of the Canadian economy" (McFetridge, 1974:5).

21 This was not the first time ERCO had received orders from its British parent as to how it should conduct itself in Canada. ERCO was expected to tailor its export policy to the international strategy of the parent company. On one occasion ERCO was instructed not to enter any South American market (Annual Report, Director of Investigation and Research, 1966-1967:26, 28).

22 The conviction of ERCO on the two monopoly counts is only the second such conviction in the history of the Act, the first being that of the Eddy Match Company in 1951.

23 Weidman v. Shragge:46 S.C.R.1.

24 The sentence could also be seen as lenient in that no attempt was made to divest ERCO of Dominion Fertilizers. In McFetridge's (1974:9) view such a divestment would have produced more harm than good for Canada's small and regionalized economy, in that diseconomies of scale would have outweighed the benefits of ERCO's reduced market power. Inevitably the Canadian economy will be dominated by a few producers enjoying optimum conditions of scale, therefore "structural remedies such as forcing established firms to divest themselves of a part of their operation and prohibition and dissolution of mergers will be minor elements in any Canadian competition policy. Indeed, the government may feel it necessary to promote mergers" (pp. 1-2).

McFetridge argues that other methods should be adopted to counter market power arising from mergers, such as tariff changes and control of price discrimination.

25 In the Canadian Breweries and British Columbia Sugar Refining cases in 1960 the courts ruled that for a merger or monopoly to be illegal competition had to be virtually eliminated. A merger must "so extinguish competition as to affect prices by monopolistic control" (Sexton, 1963:33). Detriment was a question of fact and must be shown to flow from the merger in question. The defendants in these two cases were acquitted because the courts found some competition existed. The findings appeared to give approval for all mergers "unless they were to terminate in a monopoly or were intent on becoming a monopoly ..." (Lyon, 1963:165).

In the ERCO case the merger with Dominion Fertilizers eliminated competition and subsequent agreements maintained that status quo. The offence lay in the illicit manoeuvres by ERCO to arrive at a monopoly and to defend it, not in possessing a monopoly as such. McFetridge's confidence that convictions would have been obtained, had all the charges been contested, has to be weighed agained Lyon's (1963:165) view that the merger provision of the Act had only remained operable because the Crown in 1960 refrained from appealing to the Supreme Court because of fear of losing.

26 Several of the merger and monopoly cases in this period were resolved outside of the criminal justice process, by the Bureau of Competition. For these cases, all of which resulted only in an administrative Order of Prohibition instructing the accused to discontinue objectionable activities, less information is available both as to background details and the rationale informing bureaucratic decision making. The chief source of information is the annual reports of the Director of Investigation and Research. The facts contained therein are in principle the basis for the skeletal accounts presented here.

27 According to Gorecki and Stanbury (1979:165) the case first came to the attention of the Director's office in 1965, but no mention of it appears in any of the annual reports until 1970-1971.

A file was opened in August, 1965 in response to a complaint from the public, then held in abeyance pending the outcome of another case, then continued in March, 1967. A search of the business premises of the three companies for documentary evidence took place in January, 1969 and a Summary of Evidence was sent to the Attorney General's office in August, 1969.

Even so, an Information was not laid until October, 1970 and an Order was approved in February, 1971 (p. 165, fn.). Gorecki and Stanbury (1979:153-157) have noted the increasing amount of time taken to resolve cases in recent years.

The authors contend that no fine or penalty other than the Order was imposed "at least partly due to the delay in investigating and prosecuting the case" (p. 165).

28 An officer of General Foundry Works Limited told the Commission the two items "could pay your salary for a year" (Annual Report, Director of Investigation and Research, 1967-1968:36). This suggests price "gouging", but the Commission made no comment.

29 The case involved the issue of whether a supplier has the right to refuse supply when the reseller prices the goods at below cost, as a "loss-leader" item intended to drawn custom to the sales outlet, in this case a supermarket. The Supreme Court ruled that the supplier in such circumstances may refuse supply but may not dictate price (Annual Report, Director of Investigation and Research, 1971-1972:58-59).

The relevance for the case under discussion was Anthes' refusal to sell a patented mechanical joint to competitors. Hence the reference to mechanical joints in the Order of Prohibition.

30 This case, Gorecki and Stanbury (1979:166) note, was "also plagued by long delays", whose outcome was "less than probably could have been gained if the case had been more astutely managed". A file was opened in response to a complaint in October, 1966. The business premises were first searched almost two years later, in July, 1968. A Summary of Evidence was sent to outside counsel only two years after that, in July, 1970. Another two years passed before an indictment was issued in October, 1972.

31 Between 1965 and 1974 Safeway expanded from 22 to 42 stores in Calgary and from 25 to 36 in Edmonton, and had removed most of the independent retailers by the time of the criminal charges (Mitchell, 1975:189).

32 The Crown indicated that Parliament's intention in providing for orders of prohibition in lieu of a criminal trial, had been twofold "(1) to provide, in appropriate cases, a more effective remedy or deterrent than a monetary penalty, and (2) to avoid the necessity of prosecution in every case" (14 C.C.C. (2d.) 17). The Supreme Court of Canada, in upholding the validity of this procedure, and stressing that it

is in itself a criminal proceeding, remarked that fines imposed upon conviction in combines cases bore "a close likeness to periodic licensing of illegality" (p. 17).

Mitchell (1975:189) points out that by agreeing to the Order Safeway avoided financial penalties altogether and, all things considered, the "out of court settlement was a slap on the wrist to Safeway ...".

33 The Crown argued that the effect of the prohibition orders would quickly be an increase in competition in the grocery retail business in Calgary and Edmonton. In fact there has been merely a temporary slowing of expansion by Safeway. The Orders referred only to the 1973 boundaries of Calgary and Edmonton, and did not prevent Safeway participating in suburban expansion (Mitchell, 1975:189). Even within the old city boundaries Safeway's relentless march to monopoly has been resumed, with the 1987 purchase of 23 Woodward's "food floors". Safeway avoided a hearing before the Competition Tribunal set up under the 1986 Competition Act by agreeing to sell 12 of its stores in western Canadian cities (a good deal in the circumstances). The sale will be accomplished in the next one and one-half to two years, to prevent Safeway obtaining "a virtual stranglehold on the market" (Edmonton Journal, May 21, 1987:B7).

The arrangement appears to offer some degree of protection to independent retailers who may buy stores from Safeway, but the deal worked out with the Competition Bureau has given rise to concerns from food wholesalers and dairy product suppliers, who fear exclusion if Safeway chooses to favour its own suppliers. The Director of the Competition Bureau, Calvin Goldman, says he will continue to monitor Safeway's operations (Edmonton Journal, May 21, 1987:B7).

34 In the past Safeway had practiced "predatory pricing", by which the amount charged for specific goods was reduced to meet or undercut the prices of competitors in specific localities of Calgary, while maintaining higher prices for the same goods elsewhere in the city. Prices were reduced only in outlets adjacent to the local competition and only for as long as the competition did not raise its prices for the goods in question (Annual Report, Director of Investigation and Research, 1973-1974:32-33).

VII. THE ENFORCEMENT OF THE COMBINES INVESTIGATION ACT, 1945-1986: (2) 1973-1986

Regina v. Allied Chemical Canada Ltd. and Cominco Ltd.

Background

Prior to 1961, the commencement of the period of the indictment, Allied Chemical was the only producer of sulphuric acid in the southwest mainland of British Columbia and Vancouver Island, producing 15,000 tons annually. (Despite this absolute monopoly the Crown did not allege a violation of the Act. The pulp and paper companies who purchased the sulphuric acid, the "public" referred to in the indictment, had no complaints about price, service or supply: [1975] 6 W.W.R. 495).

At this time Cominco had a growing surplus of sulphuric acid, a by-product of its smelter operations, which the company had developed from a waste product and pollutant into an important fertilizer ingredient. The fertilizer market, however, was in decline and Cominco sought an alternate market, finding it in the lower mainland and Island area which was also the market for Allied Chemical (p. 497). Instead of actively competing with one another the two companies in 1963 reached an agreement in the form of a contract whereby Allied, owner of a small and outdated plant, would cease production and would receive all of its supply from Cominco's smelters. Allied would then sell to its corporate clients as before. The price of the acid was set by Allied, but in consultation with Cominco. Profits were shared equally and the contract, while showing no obligation on the part of Allied to consult its partner, stipulated that Cominco need not supply Allied if the price fell below $4.45 per ton (p. 499). In effect Allied was Cominco's sole customer, and throughout the period of the indictment "both operated on the basis of supplying all the acid required by Allied for all its operations in western British Columbia" (p. 497).

The case prepared by the Director of Investigation and Research was referred to the Attorney General of Canada on December 11, 1972. Three charges were laid on March 5, 1974 and a preliminary hearing took place in September, 1974. The trial began in January, 1975 and ended in March (Annual Report, Director of Investigation and Research, 1975-1976:22).

This case was heard in the Supreme Court of British Columbia before Mr. Justice J. Ruttan, and judgement was given on August 1, 1975. The defendants were charged with one monopoly count under section 33 of the Act and two conspiracy counts under section 32. All charges pertained to the period January 1, 1961 to March 15, 1974. The Crown alleged that in this period the defendants "created an absolute monopoly with the purpose and result of destroying all competition ..." ([1975] 6 W.W.R. 484) and:

> "... substantially controlled the business of manufacturing, distributing and supplying sulphuric acid, and have operated that business to the detriment of the public in the lower mainland and Vancouver Island areas of British Columbia" (pp. 494-495).

The evidence submitted by the Crown consisted entirely of documents in the form of corporate letters, conference notes and other memoranda, "in effect", said the Court, "proving the case out of the mouths of the accused ..." (p. 493). A difficulty, however, was that parts of the documentary evidence were pertinent to both the monopoly and conspiracy charges, particularly the contract signed by the two parties in 1963 (p. 484).

Judgement

Parliament, said the Court, in enacting anti-combines legislation, regarded competition as a "fundamental principle" of economic life in Canada and a public right (p. 485). Nevertheless only some incursions on that right would be objectionable, those that result in a public detriment. Market control which "excluded, for all practical purposes, the possibility of any competition" creates a presumption of detriment, but one that is rebuttable. Monopoly and competition were not mutually exclusive under the Act. A degree of control might in fact be more beneficial to the public than free competition, a situation typically found in Canada as "monopolistic competition" (p. 485). Endeavouring competitively to arrive at a position of monopoly was a legitimate entrepreneurial objective (p. 486). "Substantial" or complete control were grounds for a monopoly conviction if accompanied by public detriment or the likelihood of detriment, but detriment, as the Irving case had shown,[1] was a finding of fact beyond any reasonable doubt (p. 490).

The Appeal Court in the Irving case had interpreted "likely" to mean "will probably" not "may possibly" (p. 490), and that appeal was now found to be "of particular application and significance to the case at bar" (p. 491). The Irving case had demonstrated that there could be no presumption of lessened competition arising from the attainment of a controlling interest.

> "So, in the present case, mere acquisition of control of the business of supplying acid in western British Columbia does not raise the presumption of lessening or preventing competition, nor is detriment or the likelihood of detriment to be presumed to flow" (p. 491).

The Crown's argument here was of potential detriment. The public was not enjoying the full benefits which ought to arise from the new producer of acid and "as a consequence, was faced with a potential future detriment" (p. 501). Failure to create a benefit might, as the Crown would have it, be the equivalent of inflicting a detriment; the Court agreed, but said the supposed benefit must be more than a presumption or possibility in the mind of the Crown.

> "It must be shown that the operation of the companies in such a case had been to deny an obvious benefit and thereby create an inevitable detriment, or the probability of an inevitable detriment to the public" (p. 502).

In considering the facts of the case the Court found an absence of control (in terms of the definition offered by the Appeal Court in the Eddy Match case) by Allied prior to 1963, in that there were suppliers in the northwestern United States and in Fort Saskatchewan, Alberta "who could readily come into the market", despite the added cost of the tariff and freight charges. The former, evidence showed, would largely have been remitted by the pulp companies (pp. 495-496). Evidence also revealed that the pulp companies had some control of acid prices (p. 496).

> "Thus before Cominco concluded its agreement with Allied in 1963 there were competitive forces at work both as to supply and price, kept up sometimes by tariffs or freight rates, to check any attempt at monopolistic control on the part of Allied" (p. 496).

The evidence did not support the Crown's case that the public endured high prices and scarce supply (p. 496). Since 1965 United States prices had been higher than those of Allied and Cominco, which at the time of adjudication were the lowest in North America.

The Court noted that the monopoly charge defined the monopolistic market as the south-west mainland and Vancouver Island where the accused in fact had supplied virtually all the demand, while the accompanying conspiracy charges referred to a larger geographical area. Moreover, it was inescapable that "no such limitation" with reference to monopoly "was contained in the contract which is relied upon by the Crown as creating both the monopoly and the conspiracy" (p. 497).

In fact evidence showed "bitter and sustained competition" between Allied and another firm, Inland Chemicals, in the larger area throughtout the period of the indictment.

> "If Allied has had almost complete success in retaining its customers in the lower mainland area, it has not done so without vigorous competition from Inland Chemicals. Moreover Allied has made forays into other parts of British Columbia, ... where it has battled with the same Inland Chemical Company. It is

> significant that it has largely lost the market in the northern area of British Columbia to this competitor" (p. 497).

It appeared to the Court that the market had been "artificially limited" to satisfy the charge (p. 498). The corporate structure had not changed, since Allied Chemical was a distinct corporate identity from that of Cominco. If Allied's monopoly was not objectionable before the 1963 contract it could not be so now. "Allied acquired nothing except a new supplier. It already had the market" (p. 500).

The Crown had spoken of barriers to market entry but had produced no evidence of any obstacles which had not existed prior to the 1963 contractual agreement. What had changed was that there was now an enlarged new supply of cheap acid from Cominco and, despite this, "competition still developed and increased both in the lower mainland area and in the new area around Prince George" (p. 501). There was no evidence of direct action by Allied or Cominco to eliminate competition. "The only real source of detriment lies in the failure of the two accused to compete with each other" (p. 501). The Crown asserted the public right to that competition, which would make the new acid supply supplemental rather than a substitute for Allied's production, thus lowering prices. Instead, the accused had sought to entrench their monopoly "and frustrate the emergence of any threat to that position" (p. 501).

The Court did not find any actual detriment, however. The "public" was represented by the pulp mills and their purchasing agents who had testified as to their satisfaction with the price, supply and service throughout the period in question. Allied continued to provide all the acid required as demand increased.

However, "the Crown's real complaint is not of detriment in fact, but potential future detriment". The public was not enjoying all the benefits derivable from the enlarged new supply. Competition between the accused could have reduced prices from $29 per ton to $17 per ton. The documentary evidence showed acid could be delivered in the Vancouver area at that price, but without allowing for profit or capital and distribution costs (p. 502). The Crown conceded there would be no profit but (somewhat egregiously) had argued that "the public was entitled to the result of that cut-throat competition" (p. 503). The Court pointed out that had Cominco followed the Crown's advice it might have been subject to a criminal charge under section 34(1) of the Act, which prohibits selling "at prices unreasonably low ..." (p. 504), and in fact Inland Chemicals had so complained concerning prices in other parts of the country.

> "Therefore, the Crown's submission here must be that Cominco should be forced to compete even at a loss, and at the risk of being charged with a criminal offence. I agree here with the defence counsel that Cominco should not be required to come into the market under such terms or conditions" (p. 504).

The Crown had enumerated types of public detriment (pp. 504-507), the obverse of which were benefits of competition foregone by the pulp companies and, by extension, the general public. The Court found these putative benefits to be speculative and without substance. The assertion that the public had been denied alternate sources of supply was contradicted by the fact that Cominco had several production centres to Allied's single antiquated system and the volume of supply was thus enlarged. There was also competition within British Columbia from Inland Chemicals and potentially from the northwestern United States. The argument that Cominco's prices could have been lower, the Court felt, did not allow for freight costs. Prices were low enough to benefit the buyers.

The prosecution had also argued that competitors had been deterred from locating in the market area. The Court found that two companies had considered doing so but had refrained because they considered the market not to be large enough. There was no evidence either had been prevented from entering by the accused. Lastly, the Crown charged that the public was denied benefits of competition from producers outside the market area. Inland Chemicals competed in Kamloops and Prince George and "eventually took most of the market" (p. 506). In the early 1960's United States prices were lower, requiring Allied to price competitively with them. After 1965 potential competition from the United States had priced itself out of the market. The Court found that these companies had not offered competition "for their own reasons" (p. 507).

> "Summing up on the monopoly count in this indictment, I find that the Crown has failed to establish a monopoly within what may be called the 'statutory' meaning of the word. The structure remains exactly

> as before, with each party its own master under its own power, save that Allied is dependent on Cominco for its source of supply of acid" (p. 507).

Allied enjoyed a monopoly in the early years:

> "But the monopoly lacked substantial control and for what control it did exercise there was no resulting detriment. Whether or not the relationship between Cominco and Allied was that of a conspiracy,[2] it certainly was no monopoly. The one possible source of detriment, the agreement not to compete with one another has not shown any resulting detriment in the 14 years of the operation under review" (p. 507).

REGINA V. CANADIAN GENERAL ELECTRIC COMPANY LTD. ET AL.

Background

The charges, two of monopoly and one of conspiracy, arose from the findings of a Restrictive Trade Practices Commission report submitted to the Minister of Consumer and Corporate Affairs on January 14, 1971 and made public on February 11 of that year. The report examined the pricing, supply and distribution practices of Canadian General Electric, Westinghouse Canada and GTE Sylvania Canada Limited, "the principal firms in the electric lamp field in Canada" (Annual Report, Director of Investigation and Research, 1970-1971:38). The lamps in question were manufactured for residential, commercial, industrial and municipal use and are known colloquially as "large lamps".

The Commission's hearings were conducted in response to an initial inquiry by the Director of Investigation and Research for combines matters. In his testimony to the Commission the Director alleged that Westinghouse and

Sylvania had practiced resale price maintenance prior to 1963 and that "all three companies were parties to a conspiracy to prevent or lessen competition unduly", and that "they constituted a monopoly which had operated and was likely to operate to the detriment of the public" (pp. 38-39).

The Restrictive Trade Practices Commission found that all the Director's assertions were substantiated by the evidence they had heard. The three companies, the Commission concluded, operated a conspiracy between February 1, 1959 and August 25, 1967 which resulted in competition being lessened unduly in the manufacture, distribution, sale and supply of large lamps. With regard to the monopoly allegations the three companies were found to have:

> "... substantially controlled the business of the manufacture, distribution, sale and supply of electric large lamps and have operated and are likely to operate such business to the detriment or against the interests of the public and are parties or privies to a monopoly within the meaning of section 2(f) of the Combines Investigation Act and contrary to section 33 of the said Act" (p. 39).

The Commission perceived the monopolistic control feature "to be the most important aspect from the point of view of detriment to the public" (p. 39). The common practices of the three firms gave them shared monopolistic control of supply and distribution. Manufacture of large lamps by a fourth company, Service Lamp Company Limited, and imports by independent suppliers were not sufficient to threaten the control of the three larger manufacturers when "acting in concert" (p. 39). Many imports were in fact handled by the "big three".

By 1963 all three companies had adopted consignment selling which allowed them to set conditions for sale, including price. Non-consignment distributors also received lamps but were restricted as to types they could sell. Canadian General Electric, the largest manufacturer, was found to be the "price leader" of long standing; published lamp prices of the three major manufacturers were identical. Since 1959 the industry had observed a "Large Lamp Plan" drawn up by the price leader which was still in force at the time of the Commission hearings (p. 40). One of the clearest manifestations of the pricing policy was the submission of identical public tenders by the oligopoly. Apart from distributors of household lamps on a non-consignment basis, the Commission found "the same non-competitive situation would generally be faced by any purchaser of electric large lamps" (p. 40). Prices were increased in unison even as prices in the United States declined. Such a policy, the Director had suggested, was "a basis for substantial profits" (p. 41). The Restrictive Trade Practices Commission considered that such control "constitutes a monopoly situation which has had detrimental effects" (p. 41). The Commission called for an end to identical price lists, differential pricing among types of customer, consignment selling, the adoption of competitive bidding in public tendering and a reconsideration of tariff policy (pp. 41-42).

Motion to Quash the Indictment

The trial was preceded by a defence motion to quash the indictment on the grounds that one monopoly charge (count one) and one conspiracy charge (count three) covered the same period (January 1, 1959 to August 9, 1960), which, the defence argued, by reason of section 32(2), a provision of the 1952 version of the Act (amended August 10, 1960), could not be laid on the same indictment. Judge J. Pennell ruled that section 32(2) merely prevented charges under section 32(1) of the Act and section 411 of the Criminal Code on the same indictment, and did not preclude counts one and three under the Combines Act as was the case here (17 C.C.C. (2d.) 439). Defence counsel argued that the intention of the 1960 amendments by which section 411 of the Code was repealed and transferred to the Combines Act as section 32(1), was to continue section 411. The Court granted that greater particulars of the counts were warranted. These rulings were delivered on January 3, 1974. A further motion for separate trials for the monopoly and conspiracy counts was denied on February 18, 1974.

Judgement

The trial began in the Ontario High Court of Justice on March 4, 1974 and concluded on July 8, 1974 (Annual Report, Director of Investigation and Research, 1975-1976: 34), although judgement was not delivered until September 2, 1976.[3] The case for the Crown was contained in almost 8,000 documents seized by combines investigators (17 C.C.C. (2d.)

448).

Due to the 1960 amendment under which section 33 had been created the indictment contained two monopoly charges, the first referring to the period January 1, 1959 to August 9, 1960, the latter covering August 10, 1960 to August 25, 1967. The conspiracy charge referred to the combined period.

The Crown's case was that:

> "... the defendants knowingly 'created' a situation whereby they substantially controlled throughout Canada the large lamp industry and have operated it to the detriment of the public" (34 C.C.C. (2d.) 497).

The case constituted the first instance of charges against a "shared monopoly", more than one distinct corporate identity not bound by a contractual or structural relationship (pp. 497-498). The accused argued they could only be guilty of a monopoly if there was an agreement between them to coordinate their actions to the public detriment. The Court ruled that independent firms might constitute a shared monopoly if their actions were coordinated to such an extent that they "work together as a unit" (p. 536). The Court referred to the defendants as "an oligopoly" and was satisfied that the three companies were in control of 95 per cent of the market (p. 502). Canadian General Electric sold approximately twice as many lamps as the other two firms combined, and therefore possessed "the natural attributes of a market leader" with "the will and capacity to lead". This was apparent from the establishment of sales plans, price schedules and consignment distribution, initiated in each case by the industry leader, and in all of which there was "follow-the-leader behaviour" (p. 502).

For a monopoly conviction, the Court said, two elements of the offence must be satisfactorily shown, market control and actual or probable public detriment (p. 535). This must be accompanied by "knowledge of the combination of circumstances which constituted the situation defined in s.2" (p. 536).

The Court rhetorically posed the question whether "knowledge" implied an agreement (the Crown asserted it did not) but did not attempt to resolve the issue.

> "I would simply say that, in my view, the accused worked together as a unit through the device of the sales plans, identical price lists and consignment system, the end result being an effective power to control the market" (p. 537).

The Court felt that the definition of the offence of monopoly had not been substantively changed, Parliament merely having "clarified by the amendment of 1960 the cumbersome draftsmanship of the earlier Acts" (p. 538). Mr. Justice Pennell took issue with previous interpretations of the Act which required public detriment to be undue, a condition borrowed from the conspiracy provision[4] which, if followed, "would alter the standard provided by the statute" (p. 539). However, in assessing whether detriment is present in a particular instance public benefits arising from a merger or monopoly must be considered. The Court was obligated "to weigh the proven benefits against the proven evils to determine if detriment has resulted (p. 539).[5] The whole of the evidence must be examined and the defendants' actions "must be considered in relation to the market and industry of which they are a part" (p. 539). The Crown may alternately prove actual detriment or the likelihood of detriment, but if actual detriment could not be adequately demonstrated during the eight-year period of the indictment, it would require "very persuasive evidence" to satisfy the Court that there was still a likelihood of detriment (p. 540). Therefore the prosectuion's case really rested on the question: "has the Crown proved the purported monopoly has actually operated to the detriment of the public?" (p. 540). The test of a prohibited monopoly was a pragmatic one focusing on the operation, the criterion being market performance.

The accused in the eyes of the Court had "placed themselves in a position to dictate trading practices to other competitors by acting as a unit in the market place", 95 per cent of which was found to be under their jurisdiction. On the face of it, then, it is difficult to see how the public interest could not have been harmed. Yet when the Court examined the facts this was not the finding:

> "Curiously a combing of the evidence turns up no substantial evidence of adverse effect flowing from the operation of the purported shared monopoly on the balance of the market ... No sufficient evidence was adduced to show that other manufacturers and suppliers were forced to deal in the market in a particular way as a consequence of the purported shared monopoly" (p. 542).

The Crown had forwarded a number of circumstances, such as identical prices and public tenders, predatory practices and restrictions on the action of agents, as proof that the operation of the monopoly resulted in an undue lessening of competition and hence detrimental to the public. The Court ruled this evidence inadmissible for the monopoly charges, in that it properly fell within the criterion of proof of the conspiracy count (and contributed to the conviction of all three defendants on that charge.

Other matters might be accepted as proof of detriment, such as impeding of imports but the evidence yielded "only a few instances ... hardly persuasive beyond a reasonable doubt" (p. 542). Another was fixed prices, and evidence had been entered which showed that a small competitor in Canada had offered lower prices, and that the defendants' prices had risen while prices for large lamps were falling in the United States. Nevertheless, the Court found the evidence insufficient to support the charge that the accused had exercised their monopoly position to fix unreasonable prices. There was an agreement on prices but what is unreasonable depends on "the economic conditions in the industry", and in light of this qualification the Court did not find the fixed prices to be unreasonable (p. 543). Nor did the evidence meet the allegation of price discrimination among different categories of customer or elimination of product choice. There may have been justification for differential pricing and perhaps not. "The onus is on the Crown. The short answer is that the Crown has not discharged the onus" (p. 543). Evidence of a reduction in the number of lamps available, derived from a single memorandum written by one of the accused, was not sufficent for a finding of deprivation either, "read in the context of the industry structure" (p. 544).

> "For the reasons above given, I feel constrained to hold that the Crown has not proved beyond a reasonable doubt that detriment actually flowed from the operation of the alleged monopoly" (p. 544).[6]

REGINA V. K.C. IRVING LTD. ET AL.

Background

In May, 1968 K.C. Irving, a prominent New Brunswick businessman with diverse economic interests, purchased the "Daily Gleaner" newspaper, published in Fredericton. In doing so, Irving became the owner of all five English language daily newspapers in the province. Irving also owned one radio station and two television stations (Reschenthaler and Stanbury, 1977:163).

Irving began buying newspapers in 1944 with the purchase of the New Brunswick Publishing Company Limited, publisher of the Saint John "Telegraph-Journal" and the "Times-Globe". In 1948 he bought the Moncton Publishing Company Limited which produced the Moncton "Times" and "Transcript", now one newspaper (Maclean's, June 24, 1985:54). In 1968 Irving bought 55 per cent of the voting stock of University Press, publisher of the "Daily Gleaner", having held 25 per cent since 1958.[7] In 1971 he obtained the remaining 20 per cent (Toronto Star, June 5, 1975:A5).

In October, 1969 the Director of Investigation and Research, Combines Branch, began investigating the newspaper industry in New Brunswick. In December, 1971 charges were laid under the Combines Investigation Act. Charged were K.C. Irving Limited and the three publishing firms. The premises of K.C. Irving Limited, and three newspapers were searched by investigators and a great deal of documentary material was removed[8] (Annual Report Director of Investigation and Research, 1971-1972:29).

The companies were charged in two indictments, the first of which was in three parts. In the first part the four companies were accused of forming a monopoly between August 10, 1960 and November 30, 1971, by which they substantially or completely controlled within New Brunswick the "business of producing, supplying, selling or dealing in English language daily newspapers" (Globe and Mail, January 25, 1974:1). In counts two and three the companies, with the exception of Moncton Publishing, were accused of forming or operating a combine (merger, trust or monopoly) between September 8, 1948 and August 9, 1960. The second indictment accused the K.C. Irving company of being part of a merger whereby competition "was or is likely to be lessened to the detriment of the public" (Toronto Star, January 25, 1974:A1).

Judgement

The trial opened on October 17, 1972 before Mr. Justice Robichaud of the Supreme Court of New Brunswick. It was the first time the newspaper business had been charged under the Act and the first time the Crown would argue that diversity of ideas was an interest to be protected under the Act (Cody-Rice, 1981:137). The defence argued that newspapers were not covered by the Act, and, failing that plea, that many other information sources independent of Irving interests were to be found in the province. The defence would also argue that the case arose from a "vicious vendetta" against the Irving family by a Liberal senator (Toronto Star, January 25, 1974:A4).[9] The trial ended on December 15, 1972 and judgement followed on January 24, 1974. All defendants were convicted on all counts, with the exception of University Press who were found not guilty on counts two and three (Annual Report, Director of Investigation and Research, 1973-1974:32).

Mr. Justice Robichaud ruled the accused had set up a monopoly, combine and merger whose object was "the prevention or lessening of competition", and this was contrary to the public interest (Toronto Star, January 25, 1974:A1). As to whether newspapers came under the Act, they were "articles or commodities which may be the subject of trade or commerce" and therefore subject to the Act (16 C.C.C. (2d.) 80-82). Despite the presence of other media, the judgement declared, the press "still mans the front lines in the bastions of our liberties and civil rights" (p. 72) and remained the most important medium in providing information and shaping public opinion.[10]

The trial focused on the issue of corporate control and public detriment. The evidence strongly indicated that K.C. Irving did not directly influence the publishers and editors of the five papers and the Court was satisfied that the latter enjoyed total editorial independence (pp. 87-93).

> "Yet the judge ruled that by ownership 'the right to control the said newspapers ipso facto became the perquisite or the attribute and prerogative of the acquiring company'" (Reschenthaler and Stanbury, 1977:153-154).

The top management officer was Mr. Ralph Costello, president of all three publishing companies, whom the judge declared to be "definitely Mr. Irving's right-hand man" (p. 154). In 1968 Mr. Costello had advised Irving to sell the "Daily Gleaner" to "take the sting out of the charge that you want to control public opinion"[11] (Globe and Mail, January 25, 1974:1).

The market in question was English language daily newspapers in the province (16 C.C.C. (2d.) 70-79), and with the purchase of the "Daily Gleaner" in 1968 "the door became completely closed to any competition in the field of English language daily newspapers in New Brunswick" (Reschenthaler and Stanbury, 1977:154). The only other paper was a French language publication which the Crown alleged Irving had tried to drive out of business. The assertion was not proven (16 C.C.C. (2d.) 97-102).

On the matter of detriment, the Court accepted that detriment had to be specifically demonstrated, but Robichaud asserted:

> "In my view once a complete monopoly has been established, such as the evidence clearly discloses, inasmuch as the post-1960 charges are concerned, detriment, in law, resulted" (p. 104).

In making a presumption of detriment Judge Robichaud apparently confused the requirements of section 33 with those of section 32 (Cody-Rice, 1981:138).

A "virtual monopoly" existed in 1948 with control of four of the five papers (Globe and Mail, June 5, 1975:2). In cases of virtual or full monopoly, the Court ruled, it was not necessary to consider economic advantages that might be claimed by the defendants. After reviewing a large number of price fixing cases, Judge Robichaud concluded:

> "... any agreement or arrangement designed to prevent or lessen competition, to restrain trade, or even tending to take it out of the realm of competition must be considered to be against public policy and consequently illegal, even although it may not appear to have actually produced any result" (16 C.C.C. (2d.) 115).

Competition had been lessened unduly and was thus detrimental to the public interest. The companies were fined a total of $150,000 and were subsequently ordered to sell within one year the Moncton "Times" and "Transcript" (Annual Report, Director of Investigation and Research, 1974-1975:32). The Court accepted the Crown motion that K.C. Irving's decision in 1972 to apportion ownership of the five papers among his three sons did not constitute divestment.

Referral to the New Brunswick Court of Appeal

The defendants appealed to the New Brunswick Court of Appeal which, on June 4, 1975 set aside the conviction on all counts.[12] The appeal was allowed principally because it was ruled that public detriment was a matter of established fact, and not of law as the trial judge had held. The trial judge was therefore not entitled to presume detriment (23 C.C.C. (2d.) 502).

Mr. Justice Limerick for the Court said detriment would have been present if New Brunswick Publishing had discontinued distribution of the Moncton "Times" in the North Shore area where two morning papers competed,[13] or had agreed with other owners to increase prices unreasonably. Instead the papers "were among the last in Canada to raise their price from eight cents to ten cents" (p. 491). Nor were their advertising rates above the average rate in Canada.

Editors and publishers enjoyed complete autonomy and publishers were retained after acquisitions (p. 489). No evidence of direct control by K.C. Irving had been offered (p. 492). The only allegations of detriment made by the Crown were in the matter of lessening of competition, when competition only existed in the North Shore area.

> "Each paper acquired, with one exception, operated in its own community and had control of the business in that community. As none of the papers competed with each other in the communities in which they operated, there had been no change in the level of competition as a result of the final acquisition of the Fredericton paper"[14] (Cody-Rice, 1981:139).

The Crown had argued for detriment "on a general or theoretical basis without supporting evidence of any actual lessening of competition" (Reschenthaler and Stanbury, 1977: 157). There was no detriment with regard to circulation rates, advertising content, and rates and improvement of quality and quantity of news after the acquisition of the

"Daily Gleaner".

The Appeal Court conceded that it would be extremely difficult for an independent English language daily to start up in New Brunswick, but that had always been so given that five such newspapers were already established, regardless of who owned them (23 C.C.C. (2d.) 495); the issue here was not that of entry but whether the acquisition of the "Daily Gleaner" was detrimental to the public interest. As long as the paper operated independently of the parent company and no specific detriment could be shown, total control by the Irving family of the English language daily press in New Brunswick was not actionable under the law. Nor could the likelihood of detriment be presumed, given the absence of detriment in the 25 years prior to the establishment of an absolute monopoly (pp. 493-496). Indeed public benefits had been demonstrated[15] as a result of the takeover, including increased competition in the North Shore area (p. 490).

University Press "could in no way be deemed to have participated in the formation of a monopoly"; New Brunswick Publishing and Moncton Publishing "were in no way involved in the formation of a monopoly between 1960 and 1971" (pp. 491-492). Nor was there evidence that Moncton Publishing and University Press as individual companies took part in the operation of a monopoly (p. 492). The trial judge had adopted the dictionary definition of "monopoly" instead of the more restrictive definition under the Act, one which requires proof of public detriment (p. 488).

Mr. Justice Limerick agreed with a ruling in the British Columbia Sugar Refining case that since lessening of competition was not mentioned as a separate offence in the indictment, "the burden is on the Crown to prove the merger operated or was likely to operate unduly to the public detriment". Once again the requirements of "unduly" for conspiracy cases and "public detriment" for merger and monopoly offences were fused to comprise an insuperable obstacle for government prosecution. It was not enough for the Irving family to establish a complete monopoly detrimental to the public interest; it must be unduly detrimental (Reschenthaler and Stanbury, 1977:158).

The Appeal Court questioned whether the Act was intended to protect diversity of ideas. The Act applied only to commercial transactions, "the buying and selling of such articles as newspapers, paper plates or any other commodity" (Cody-Rice, 1981:139). The Supreme Court would elect not to make a ruling on this matter since it did not directly figure in the appeal (32 C.C.C. (2d.) 5).

Appeal to the Supreme Court

For the first time the Crown took a combines case to the Supreme Court of Canada which would decide: (1) whether the Appeal Court had misinterpreted the words "to the detriment or against the interest of the public ..." in section 2 of the Act; the Crown contended that detriment resulted from the prevention or lessening of competition, (2) whether the Court erred in holding (a) no presumption arose of detriment or likely detriment to the public when competition has been prevented or lessened unduly, (b) even if there was such a presumption there could be evidence to rebut it; interference with competition was undue and hence gave rise to a presumption of detriment not rebutted and that in any case detriment had been proved, (3) the Court erred in its interpretation of "competition"; the Crown's reasoning was that there could be no competition among subsidiaries of the same parent company engaged in the same business over which control had been obtained, or at least that it was likely, as a necessary inference, that competition will be lessened as a result (p. 9).

On November 16, 1976 the Supreme Court made known its ruling. Among the findings of fact which guided the Court's deliberations were: (1) following the 1968 takeover no change in the respective market areas occurred, nor was any attempt made to eliminate competition when circulation overlapped, (2) no direct evidence had been offered to show that editorial control of the five papers was not in the hands of the respective publishers and editors, (3) no detriment had been found on the matters of circulation rates, advertising content and rates, or quality and quantity of news, (4) all five papers had increased circulation under Irving ownership, (5) despite monetary losses two morning papers, one monthly publication and a printing plant had continued to operate, (6) there had been a substantial improvement in the facilities of the publishing companies and all enjoyed financial stability, (7) newspaper profits were reinvested in the New Brunswick economy (Reschenthaler and Stanbury, 1977:158-159).

In its factum the Crown argued the Appeal Court had confused genuine competition with the pseudo-competitiveness among enterprises in common ownership. Therefore the Appeal Court was wrong in ruling that competition was not lessened by the acquisition of the "Daily Gleaner".

The Crown submitted that complete control of a market may be "to the detriment and against the interest of the public", because of the lessening of competition, if there is an undue lessening of competition there is a rebuttable presumption of detriment. The 1968 acquisition of the "Daily Gleaner" produced a monopoly both in the dictionary sense and in the terms of the Combines Investigation Act. The English language newspaper monopoly in New Brunswick lessened competition and constituted public detriment as intended by section 2 of the Act. Detriment was contained in the complete monopoly and need not be presumed.

The Supreme Court in a unanimous (9-0) ruling said it was not enough to show complete control of a market. For the offence of "monopoly" to be met in the Act specific detriment had to be shown, and this the Crown had failed to do. On proof of complete control competition "is taken to be either materially lessened or eliminated" (p. 160), and what remains to be shown to satisfy the offence of monopoly is that the bueiness has been operated or is likely to be operated to the detriment or against the interests of the public, with the emphasis on "operated" (32 C.C.C. (2d.) 8).

In this case it had not been shown that competition had been lessened and where competition did exist it had increased (pp. 12-13). The Court accepted that newspapers, as essential sources of information, were different from other ventures, and that the courts should view newspaper mergers or monopolies "with greater concern for maintenance of freedom in the communication or dissemination of news and ideas" (p. 6). To the Crown's argument that complete control of a market was equivalent to the undue lessening of competition in conspiracy cases and therefore constituted proof of public detriment, the Supreme Court replied that such a presumption required new legislation (p. 12). As for the 'expert witnesses" who spoke of public detriment arising from the loss of independent ownership:

> "They spoke theoretically, without having made any study of the situation in New Brunswick, nor did they address themselves to the facts relating to the operation of the newspapers involved in the present case" (p. 13).

REGINA V. THOMSON NEWSPAPERS, SOUTHAM INCORPORATED ET AL.[16]

Background

The charges arose from a series of events in the Canadian newspaper industry in 1979 and 1980. On September 25, 1979 FP Publications closed down its "Montreal Star" newspaper after 111 years of publication, leaving Montreal anglophones with only one newspaper, the "Montreal Gazette" owned by Southam. On January 31, 1980 FP Publications was acquired by Thomson Newspapers for $164.7 million; thereafter the company operated as a subsidiary of Thomson Newspapers and was charged as such. On August 27, 1980 two more cities became one-newspaper towns when the "Winnipeg Tribune" and the "Ottawa Journal", owned by Southam and Thomson respectively, ceased publication. The closures left Thomson with a monopoly of the Winnipeg market ("Winnipeg Free Press"), while Southam operated the only newspaper in the capital ("Ottawa Citizen"). The previous month Thomson Newspapers exercized an option it had inherited from FP Publications to buy a one-third share in Southam's "Montreal Gazette"; on the same day the Winnipeg and Ottawa newspapers closed Thomson sold that share to Southam, giving it 100 per cent of the Montreal newspaper. Also on that same day Southam purchased Thomson's 50 per cent share of Pacific Press in Vancouver, which published the two Vancouver dailies "The Province" and the "Vancouver Sun". Southam now had 100 per cent control of Vancouver. Finally, Thomson purchased the assets of the "Winnipeg Tribune" just hours after it closed.

Therefore in a single day, August 27, 1980, referred to as "Black Wednesday" by industry employees, 1,740 of whom lost their jobs, the structure of the Canadian newspaper industry had been radically transformed (Maclean's, May 17, 1982:44). Adding significance to the event was the fact that Thomson and Southam were already Canada's largest newspaper ownership groups.[17]

When the corporate shuffling was over Southam had a monopoly in Montreal, Ottawa and Vancouver, while Thomson controlled Winnipeg and gained $57 million in cash from its sale of assets in Montreal and Vancouver (Toronto Star, November 11, 1983:E5). The closures led to a lengthy investigation by the Department of Consumer and Corporate Affairs, and in September 1980 the head offices of Thomson and Southam were searched and documents seized, 230 of which would be entered as evidence by the Crown and constitute the basis of the government's case. Following hearings before the Restrictive Trade Practices Commission charges were laid on May 1, 1981 and on May 5, 1982, after a preliminary hearing lasting three months, the matter was sent to trial. After further delays the trial began on September 19, 1983 in the Ontario Supreme Court before Mr. Justice William Anderson. It was clear from the outset that the trial would be "one of the more complex in Canadian legal history" (Toronto Star, September 18, 1983:A18). The defendants pleaded not guilty to all charges.

The two newspaper groups and five subsidiaries[18] faced eight charges in all: three of unlawful conspiracy to lessen or prevent competition unduly, three of creating mergers designed to lessen or prevent competition to the detriment of the public and two of creating monopolies harmful to the public interest (Toronto Star, September 20, 1983:A15). Although no individuals were formally charged three persons were cited as unindicted co-conspirators: John Tory, a senior executive for Thomson Newspapers, Gordon Fisher, president of Southam and George Currie, former president of FP Publications. A vice-president of Southam, William Carradine, was charged with obstructing an inquiry under the Combines Investigation Act, contrary to subsection 41(1) of the Act[19] (Annual Report, Director of Investigation and Research, 1981-1982:46).

The Case for the Crown

In his opening address Crown counsel said the essence of the government's case was that the decisions to close newspapers in several cities were not independent of one another, but were intended "to lessen or prevent newspaper competition in the four cities to the detriment of the public" (Toronto Star, September 20, 1983:A15). The two chief defendants conspired to eliminate competition by trading newspaper markets in Montreal, Ottawa, Winnipeg and Vancouver, creating monopolies in all four markets[20] (Globe and Mail, September 20, 1983:4). The newspaper groups "used the newspaper markets in four cities as a whole in dealing with one another" (Edmonton Sun, September 20, 1983:42). Senior officers of the companies discussed the future of newspapers in Ottawa, Montreal and Vancouver "several times in the late 1970's", the Crown charged, and documents would show a "deal" was discussed (Globe and Mail, September 21, 1983:4).

In Montreal, for example, a series of meetings took place in the summer of 1979 between Southam and FP officers. These talks resulted in a written agreement to close the "Montreal Star" (owned by FP) and sell the assets to Southam. In return for closing the newspaper FP obtained an option to buy one-third of the "Montreal Gazette", owned by Southam (Toronto Star, September 20, 1983:A15).

The government would try to prove that "a trade of newspaper markets was contemplated" in 1980, was accomplished on August 27 and that the subsequent loss of competition was detrimental to the public interest[21] (Edmonton Sun, September 20, 1983:42).

Seized corporate documents were entered as evidence that the defendants had set a timetable for the closing of the "Ottawa Journal" and "Winnipeg Tribune", with a realignment of holdings in Montreal and Vancouver. Documents showed that Southam and FP had discussed the Ottawa market as early as 1977, where at that time FP owned the "Ottawa Journal". The Crown said it would cite the timing of events and their chronology to prove the chains conspired to extinguish competition in four cities (Edmonton Sun, September 21, 1983:40; Toronto Star, September 21, 1983:A10).

A memorandum seized from Southam's head office was entitled "The Deal - 4 Parts", and subtitled "Thomson". The memo read: "(1) They get out of Ottawa; (2) They get out of Montreal; (3) They get out of Vancouver; (4) They get control of Winnipeg"[22] (Edmonton Journal, September 28, 1983:A2). The memo was an accurate prediction of what transpired on "Black Wednesday".

Another document, in the handwriting of senior vice-president William Carradine, estimated extra profit for Southam if Thomson's "Ottawa Journal" should close, along with Southam's "Winnipeg Tribune", both of which were money-losers. The document estimated additional profit for Southam of $15.2 million in 1981, $18.7 million in 1982 and $20.3 million in 1983 (Toronto Star, September 28, 1983:F10). The document was dated July, 1980, just one month before the two newspapers closed, and was found in 16 pieces in Carradine's waste basket, in the course of a search by combines investigators on September 9, 1980 (Toronto Star, September 21, 1983:A10). The document, said the Crown, had been destroyed "as well as a document can be manually shredded without a machine ...". The fact that Carradine found it necessary to destroy the paper so meticulously "indicates he believed he had something to fear"[23] (Globe and Mail, October 19, 1983:4).

Also among papers taken from Southam's head office was a handwritten sheet which read: "Destroy Book ... We have all of Montreal and Vancouver. They have Winnipeg", a document which listed prospective actions and was entitled, "D - Day + 2". Pages from the desk diaries of Southam's president Fisher and Thomson executive John Tory listed several meetings between them prior to August 27, 1980 (Globe and Mail, September 28, 1983:3).

Montreal

In Montreal in the late 1970's Southam and FP competed for the English language market. FP owned the dominant newspaper, the "Montreal Star", with a circulation of 410,000 in June 1978 and a $5 million profit annually, while Southam's "Montreal Gazette" circulation was 234,000

(Yates, 1982:239).

This situation was abruptly altered in June, 1978 when the "Montreal Star" suspended publication because of a strike by pressmen that was to last for eight months. This "incredible stroke of luck" (Allen, 1980:82) for the "Gazette" was taken full advantage of by the newspaper, whose circulation almost doubled by the end of the year. When the strike ended in February 1979 the "Montreal Star" was obliged to enter into a "circulation war" and intense competition for advertisers, a struggle that was costly to both sides and ultimately unsuccessful for the "Star". On July 18, 1979 FP began negotiating with Southam on the possibility of a merger. Southam was not agreeable and the "Montreal Star" closed on September 25, 1979.

Four years later the Crown attempted to retrace the events that led to the "Star"'s demise, and was able to show that negotiations between the two sides reached back to 1977. A memo dated April 11, 1978 written by FP president George Currie described a telephone conversation between Currie and Southam's president Gordon Fisher, in which Fisher asked Currie if he was aware that Southam was prepared to buy the "Montreal Star". Fisher had expressed this wish to Currie's predecessor in 1977 in a confidential letter, which had been carefully scrutinized by Southam lawyers to ensure it did not violate the anti-combines law.

The memo also indicates the "Ottawa situation" (where the two companies were also in competition) was discussed by Currie and Fisher. On the matter of the possible legal ramifications of an agreement, Currie notes:

> "Gordon thought the proposed amendment to the Competition Act could be quietly forgotten by the government" (Edmonton Journal, September 21, 1983: A3; Toronto Star, September 21, 1983:A10).

The memo continued:

> "Thus the existing legislation is likely to remain in force for some time, and Gordon suggested this could provide the opportunity to resolve the Ottawa situation without concern over new anti-combines legislation" (Globe and Mail, September 21, 1983:4).

The strike at the "Montreal Star" began two months after this conversation, after which the "Star" fought to regain its market dominance. By June, 1979, however, Currie had concluded that the effort was useless and began looking for a buyer. At the same time Currie was authorized to begin negotiations with Southam with a view to operating the two Montreal newspapers under joint management (Toronto Star, September 22, 1983:A19). This was entered into reluctantly, Currie would testify, because of an undercurrent of bitterness felt by FP staff toward Southam, arising from their intense competition following the strike. While FP was agreeable to a merger with Southam in Montreal, the company did not wish to see the "Star" purchased by Southam. Unfortunately for FP, however, no buyer could be found (Edmonton Sun, September 29, 1983:47).

The Crown was able to show that negotiations had been going on between FP and Southam at least since the fall of 1978. The minutes of a Southam board meeting on October 18, 1978 were introduced as evidence, in which Fisher is identified as "GNF" and Currie as "GC".

> "GNF said to GC that if he wants to go out of business with its second rate employment and labour contracts, we would sell him a share of the 'Gazette'" (Toronto Star, September 22, 1983:A19).

An FP document dated July 4, 1979 entitled "Montreal Star-Gazette Rationalization" estimated considerable savings for FP if any of a number of envisaged arrangements could be agreed with Southam, involving shared resources or even the closing of one of the newspapers (p. A19).

In the course of negotiations FP rejected a Southam proposal that FP buy, for $10 million, a 60 per cent share of a new company which would publish the "Montreal Gazette". When asked by Southam counsel if he had demanded an "80-20 split", Currie said, "I have a recollection of putting something of that sort to him" (Toronto Star, September 30, 1983:B9).

Southam remained confident an agreement could be made. The minutes of a Southam board meeting on July 18, 1979 show Fisher telling the board that Currie would resume talks, probably the next day. Some directors wanted to merge the companies while others were determined "to drive FP out of Montreal" (Edmonton Sun, September 22, 1983:46). There were strong arguments for one newspaper, Fisher told the board, but he thought two companies were needed and he warned the board that the consequence of "putting FP out of business in Montreal and Ottawa" could be a "Newspaper CRTC" (Toronto Star, September 22, 1983:A19). However, Fisher said, "We need their assets" (The "Montreal Star" had more modern presses) and "FP is more likely to deal if we offer them part of the action" (Globe and Mail, September 22, 1983:5).

By the time talks resumed in July, Southam appears to have been resolved on extracting from FP an agreement whereby the "Star" would close. When Currie "floated" the idea of joint publishing, Fisher replied there was more profit to be had from one newspaper (Toronto Star, September 23, 1983: A23). Fisher proposed that FP close the "Star", fire its employees and maintain the building "until successor rights of Star employees have expired"[24] (Globe and Mail, September 23, 1983:5).

Both chains were concerned about the public reaction to the loss of an English language newspaper in Montreal, as is evident from a memo by Currie dated July 25, 1979.

> "Perhaps we could publish the Gazette Monday - Saturday and the Star on Sunday, which would create an impression in the public eye that both papers were being continued on a seven-day model" (Toronto Star, September 23, 1983:A23).

A memo from the publisher of the "Montreal Star" warned FP that the public would get the idea that newspaper economics was the sole consideration in the proposed deal, and to that end a voice for anglophone rights was being "sold out" by the two chains (Globe and Mail, September 23, 1983:5).

A continuing concern throughout the negotiations was the possibility of a combines prosecution. A July, 1979 memo by FP's treasurer remarks that an agreement maintaining two newspapers "will be much more saleable to the anti-combines people" (p. 5).

Currie testified:

> "We were all mindful of the interest of the combines people in an accommodation ... a single paper would attract attention" (Globe and Mail, September 29, 1983:3).[25]

Southam demonstrated its expertize in circumventing the combines laws when it stipulated that, as part of the agreement with FP, a clause be inserted which said that Southam would not exercise its option to buy the "Star"'s assets if a third party entered the market "forthwith", intent on launching a new English language daily (p. 3).

Currie testified that Southam wanted to make every effort to allow new competition into the market and that "this clause would in some degree protect us from the combines people". Currie couldn't say "positively" that Fisher simply wanted to avoid prosecution, but both realized it was "extremely unlikely" a competitor would materialize[26] (p. 3).

The former assistant managing editor for the "Montreal Star" testified she attempted to launch a tabloid newspaper to replace the "Star", but was unable to get financial support.

> "The Gazette had already picked up the best of the syndicated news, services, comics and other features the Star had used, she said. Those resources, coupled with The Gazette's own exclusive assets would discourage any competition" (Edmonton Journal, October 6, 1983:A3).

On September 6, 1979 a draft agreement was drawn up by Southam which provided for the closure of the "Star", and the creation of a company called Newco who would publish the "Gazette". The "Gazette" took an option on the "Star"'s assets, while FP agreed to pay $100,000 for an option on one-third of Newco. The "Gazette" would waive its option if new competition should appear before January 1, 1980. None did[27] (Toronto Star, September 23, 1983:A23).

Having drawn up an agreement, Southam now applied pressure to end competition once and for all. On September 20, 1979 the Southam board voted to present FP with an ultimatum. Unless FP signed an agreement by 1 p.m. on September 24 to close the "Star", Southam would end negotiations. At 10 a.m. on September 24 the FP board voted to accept the draft agreement and the 111-year old "Montreal Star" published its last edition the next day. The editorial staff were informed of the imminent demise of the newspaper at 4.05 p.m. on September 24 (Yates, 1982:242). Reporters were not told at all, and found themselves locked out (Allen, 1980:83). A total of 950 jobs were lost[28] (Globe and Mail, September 23, 1983:5).

The Tory-Fisher Meetings

Crucial to the Crown case was documented evidence of a series of secret meetings at Southam's head office, between Southam's president Gordon Fisher and Thomson's chief executive John Tory, from March to August, 1980. The meetings were arranged at Tory's request, although Fisher informed the Southam board he had expected an approach from the time of Thomson's acquisition of FP some five weeks before. The first meeting, described by Tory in one of Fisher's memos as a "wide-ranging strategic discussion without prejudice"

(Globe and Mail, September 27, 1983:5), took place on March 3, 1980 and was attended only by the two men. Although no notes were made by either side Fisher recorded his impressions in a series of memos to his board, and these were entered as evidence.

In the first of the memos, dated March 5, 1980, concerning their initial meeting, Fisher wrote: "Tory assured me that neither FP nor Thomson management groups were aware of our conversation" (p. 5). The two men then proceeded to discuss their respective problems in Montreal, Ottawa, Winnipeg and Vancouver.

Tory informed Fisher that Thomson "had a problem" with the financially failing "Ottawa Journal". In his memo Fisher writes: "I suggested it should be killed and replaced with an Ottawa and eastern edition of the (Toronto) Globe and Mail"[29] (Edmonton Sun, September 27, 1983:40).

The 1979 closure of the "Montreal Star" by FP was also discussed. Thomson now held FP's option to one-third of the "Montreal Gazette". Fisher's memoranda records a financial inducement from Southam to the Thomson chain.

> "Fisher offered Thomson a 'sweetener' of $6 million not to exercise the option it had acquired when it took over FP" (Toronto Star, September 27, 1983:B3).

With the purchase of FP by Thomson, Southam found itself in partnership in Montreal and Vancouver with a company it had little respect for. Hence Southam's anxiety that Thomson not exercise its Montreal option (Globe and Mail, September 27, 1983:5). In a letter to a former editor of the "Ottawa Journal", Fisher wrote:

> "With the Thomson purchase of FP we found ourselves in bed (in Montreal and Vancouver) with the one newspaper company in Canada with which I found it most difficult to contemplate being a partner" (Globe and Mail, December 10, 1983b:5).

The discussion shifted to Winnipeg. Fisher expressed an interest in buying Thomson's "Winnipeg Free Press" and said Winnipeg was not big enough to support two afternoon dailies (Edmonton Sun, September 27, 1983:40; Globe and Mail, September 27, 1983:5). Southam's attempt to revitalize its "Winnipeg Tribune" was not succeeding, but was hurting Thomson's "Free Press" financially (Globe and Mail, September 22, 1983:5). Fisher's March 5 memo indicates that Tory was amenable to selling the "Free Press" under certain circumstances.

> "In it, Fisher wrote that Tory hadn't ruled out selling the Winnipeg Free Press to Southam as part of a 'larger package' and that Tory appeared willing to consider 'rationalization' in markets where one or the other chain had problems" (Toronto Star, November 11, 1983:E5).

Turning to Vancouver, Tory expressed a wish to buy Southam out of Pacific Press, which publishes the two Vancouver dailies. Thomson and Southam each held 50 per cent of the company. Fisher notes: "I gave him no encouragement", but indicated that Southam might accept minority status "as part of a package that would involve rationalization in other markets" (Edmonton Sun, September 27, 1983:40). In fact, neither side was happy with any form of partnership (Globe and Mail, November 5, 1983:4).

Fisher's memo continues:

"There was a clear understanding between us that this

> was a first discussion, that no commitments or offers were implied, and that any potential deals between our companies would be surrounded with combines implications"[30] (Globe and Mail, September 27, 1983:5).

Further meetings were held, duly recorded by Fisher. In an April memo Fisher tells the Southam board that Tory would resolve "the mess in FP soon" (p. 5). The minutes of a Southam board meeting on April 25, 1980, concerning the "Montreal Gazette" option, has Fisher advising the board that Thomson "will likely exercise the option and then sell it back to us"[31] (Toronto Star, September 27, 1983:B3).

At a meeting in May, Tory told Fisher that Thomson wanted to close the "Ottawa Journal" and asked if Southam would be interested in buying it, but Fisher declined, giving as one of his reasons combines ramifications (Globe and Mail, November 2, 1983:11).

At a July meeting Fisher indicated that Southam wanted to close the "Winnipeg Tribune". Fisher noted Tory's response:

> "He suggested to me at that meeting that if the Winnipeg Tribune was closed, then the Free Press would require additional press capacity" (p. 11).

At an August meeting Fisher informed Tory that he would recommend to the Southam board that the newspaper be closed (Edmonton Sun, November 11, 1983:73). Tory had already told Fisher at an earlier meeting on July 2 that the "Ottawa Journal" would be closed (Toronto Star, November 3, 1983:E3). Early in August Fisher asked Tory if the closure of the two newspapers could be synchronized. Tory would later testify: "I was prepared to go along with the request as long as there was no unreasonable delay"[32] (Globe and Mail, November 2, 1983:11).

Ottawa

Canada's capital in the early 1970's was a competitive market for two afternoon dailies, FP's "Ottawa Journal" and Southam's "Ottawa Citizen". The latter dates its dominance from a decision to switch to computerized presses by which the entire newspaper was produced by photographic means. The "Journal" opted at this time for new but traditional presses. By 1975 the "Journal" had fallen behind in circulation. In September 1979 it became a morning newspaper and circulation improved, but the "Citizen" was to remain the dominant newspaper (King, 1980:90).

The Crown was able to show that FP and Southam had discussed the Ottawa market from the late 1970's. Fisher's 1977 letter, offering to buy the "Montreal Star" from FP, contained the suggestion that both Ottawa newspapers be published on the Citizen's superior presses, with the "Journal" switching to morning publication. "I got no response in writing", Fisher testified (Edmonton Journal, November 5, 1983:A2).

Currie, president of FP from 1978 to 1980, testified that FP no longer considered the "Ottawa Journal" had a future after it fell behind the "Citizen". From that point on, Currie said, FP looked upon the "Journal" as a "trader", which he defined as a newspaper which could be closed in return for concessions from Southam in other cities.[33]

Currie testified vis-a-vis the "Ottawa Journal":

> "Our continued existence in the Ottawa market denied Southam potential profits of $5-7 million and if we entered into negotiations in another market ... it was a potential bargaining pawn to use in those negotiations with Southam" (Globe and Mail, September 29, 1983:3).

Currie denied he had discussed this strategy with Southam's Fisher at several meetings in 1978 and 1979, specifically, a proposal to simultaneously close the "Ottawa Journal" and "Winnipeg Tribune"[34] (p. 3).

In the late 1970's FP appears to have made a genuine effort to reverse the circulation trends, failing which, the newspaper might become a major irritant to Southam. A memo from an FP director expressed the point succinctly:

> "If it doesn't succeed, the Southam's (sic) must nevertheless be made to pay a price for its removal"[35] (Globe and Mail, September 22, 1983:5).

Throughout this period the entire staff of the "Journal", buoyed by circulation gains, knew nothing of Thomson's intentions. Witnesses said a "cloud of uncertainty" hung over the newspaper, which Thomson did nothing to dispel.

James Rennie, former executive editor of the "Ottawa Journal", testified that the abrupt closing of the newspaper precluded effective efforts to establish another publication under new auspices. Rennie said he was informed of the closure at 11 p.m. on August 26, 1980, just four hours after delivering a "pep talk" to his staff.[36]

These facts are interesting in light of Tory's testimony that Thomson would not sell to a senior staff member at FP because it was felt he would mismanage the newspaper, "which in turn would result in the employees being unfairly treated"[37] (Globe and Mail, November 2, 1983:11).

Winnipeg

In Winnipeg Thomson/FP and Southam were again competitors. FP's "Winnipeg Free Press" had been increasingly dominant since the mid-1960's. In 1975 the "Winnipeg Tribune" began to fight back, with a redesign of its layout. Prior to that time a curious notion of competition prevailed in Winnipeg.

> "We all knew the fix was in. The editors never admitted it but there was a gentlemen's agreement between the Winnipeg Tribune and the Free Press to preserve the status quo ... The Free Press got upset when Tribune circulation edged over 80,000; everyone knew that in a circulation war the Tribune would lose. Or so we thought. Even the size of the news hole was regulated: 112 daily column inches for the Free Press, 108 for the Tribune. The managing editor counted them up every afternoon and got shit from the Free Press if he was over quota" (Robertson, 1980:134).

A merger had seemed likely by 1975. Instead, competition broke out after the "Tribune"'s new "look" appeared, thanks to a five-year promotional campaign during which the newspaper was sold at half-price for a time and free personal classified ads were offered (Edmonton Journal, November 5, 1983:A2). Circulation rose from 69,000 in 1975 to 105,000 in early 1977, just 25,000 less than the "Free Press", prompting a redesign of that paper. At the end of 1979 the "Free Press"'s circulation lead had stabilized at 30,000 (Robertson, 1980:136).

In late 1978, then, Southam's "Tribune" was closing on its old nemesis in a competitive struggle, costly to both sides. As a chain owner in competition with another chain, Southam was aware of possible retaliatory consequences of its Winnipeg policy from FP in cities where Southam was dominant.[38]

At one of their meetings (as has been seen) Fisher proposed to Tory that Southam buy the "Winnipeg Free Press"; in so doing, Southam would also relieve Thomson of some of its less lucrative properties (this was Fisher's explanation of a "larger package" as it appeared in his memo of March 5, 1980).

In the end, however, the "Tribune" would close, leaving Thomson's "Free Press" in command of the market. In his testimony Fisher would deny that the "Tribune"'s closure was the sine qua non for the whole "Black Wednesday" agreement. Asked why he did not attempt to find a buyer, Fisher said Southam "knew" Winnipeg could support only one daily[39] (Toronto Star, November 5, 1983:D8).

Fisher's explanation for closing the "Tribune" on the same day as the "Ottawa Journal" was Southam's concern for the welfare of employees (who, like Thomson staff, were given no warning).

> "Once I decided it had to go, I wasn't prepared to let Southam newspapers hire Thomson ex-employees when I knew they were going to have to hire some of our own" (p. D8).

Part of the August 1980 agreement was the sale of the "Tribune"'s assets to Thomson. Fisher testified that this was not done to exclude new competition from Winnipeg

(Toronto Star, November 8, 1983:D2).

Vancouver

Since 1957 the two Vancouver daily newspapers, "The Province", owned by Southam and the "Vancouver Sun" (owned by FP from 1963 to 1980), were jointly published by Pacific Press, owned equally by the two chains. Each newspaper controlled its own editorial, advertising and circulation departments.[40]

The two sides were therefore under a legal obligation to compete but the situation proved irksome, especially after Southam found itself in partnership with Thomson. In a letter written one week after "Black Wednesday", Fisher said the two chains had "hugely different philosophies" and that in Vancouver Thomson "recognized we were not natural bedmates" (Edmonton Journal, September 28, 1983: A2). It was agreed that Southam would buy Thomson out of Vancouver, the object of which, said the Crown, "was to do away with the de facto circumstances that gave rise to that competition"[41] (Globe and Mail, September 20, 1983:4).

"Black Wednesday" in Dollar Terms

At the request of the Crown a firm of chartered accountants prepared an analysis of the estimated financial gains accruing to Southam and Thomson as a result of the 1979 and 1980 agreements, based on normalized earnings and calculated in 1979 dollars.

The analysis suggested the agreements were worth $14 million annually in additional profit to Southam and $13 million to Thomson. Southam, it was calculated, gained another $11 million by gaining control of Pacific Press. The purchase of FP was worth between $2 million and $3 million more to Thomson because of the "Montreal Star" closure, while Southam's gain from its Montreal monopoly was put at between $8.5 million and $9 million.

In Ottawa, Thomson gained $3.6 million from closing the "Journal", while the advantage to Southam was $3 million. In Winnipeg Thomson's monopoly was worth $7.3 million additional profit, while Southam was able to jettison a $2.9 million annual loss from the "Tribune" (Globe and Mail, October 6, 1983:5).

A member of the accountancy firm explained that an owner obtaining a monopoly immediately enjoyed enhanced earnings from increased advertising and circulation (Edmonton Journal, October 6, 1983:A3). The figures cited were regarded as "quite conservative" by the witness (Globe and Mail, October 6, 1983:5).

The Defence: Non-Suit Motion

At the conclusion of the Crown's case defence counsel for Thomson, Southam and FP declared they would enter a "non-suit motion", a request for dismissal of the entire case on the grounds that the Crown had not presented evidence commensurate with any of the charges.

Speaking to the motion with regard to the merger and monopoly charges, defence counsel argued that the Crown had failed to prove public detriment. Monopoly was a legitimate entrepreneurial objective and was not necessarily harmful to the public interest. The demise of newspapers in Toronto in 1971 and Winnipeg in 1980 had created a monopoly only briefly, before new competition appeared, showing that closure might ultimately result in an overall improvement in competition (Globe and Mail, October 15, 1983:5). For public detriment to be proved the Crown must show that the defendants abused their positions as monopolists, for example, by means of excess profits (Toronto Star, October 18, 1983:D2).

Thomson's counsel denied any wrongdoing in Vancouver, arguing that if there was a merger it was created in 1957 with the establishment of Pacific Press, and that was years before FP or Thomson acquired the "Vancouver Sun" (Edmonton Journal, October 15, 1983:A3). As for Montreal, counsel asked how Thomson could be a party to that agreement when the company had not acquired FP at that time (Edmonton Journal, October 17, 1983:A3).

The Crown had indulged in "wishful thinking" and "inferential fantasies" (Toronto Star, October 21, 1983:E4), even drawing inferences contrary to oral evidence which the Crown had not challenged. The Crown had jumped to conclusions concerning the circumstances leading up to the closing of three newspapers (Edmonton Journal, October 21, 1983:A9). The "ultimate in inferential fantasy", said Southam's counsel, was asking the court to believe that Southam had something to hide because a combines investigator saw a company vice-president destroying a document:

> "Anybody who was conducting himself in a way to hide something wouldn't be sitting on the other side of a desk from a gumshoe tearing up a document" (Globe and Mail, October 21, 1983:8).

Much of what the Crown inferred from seized documents had been refuted by the testimony of witnesses. Tory and Fisher in their meetings had decided "to put their cards on the table and be honest with each other", Thomson's counsel said. It had been decided to bring all matters to a head at the same time (Toronto Star, October 21, 1983:E4).

FP's counsel said the facts showed Montreal was unable to sustain two English language dailies by 1979. Montrealers were therefore "entitled" to only one English language newspaper and no undue lessening of competition occurred; one must always consider the nature of the market, counsel said, and the "Star" faced a projected loss of $18 million for 1980 (Toronto Star, October 22, 1983:D8).

The facts refuted the assertion that Southam bought the closure of the "Star" (Edmonton Journal, October 22, 1983: A3). The most that could be said was that Southam bought the timing of the closure, and that was no offence. The Crown had not proven either conspiracy or public detriment (Toronto Star, October 27, 1983:D8). FP's president Currie had known in June, 1979 that the "Star" could not continue unless joint publishing could be arranged with Southam, failing which, the newspaper would have to be sold. The decision to close, said counsel, was taken on September 19, 1979, before Southam made an offer (Edmonton Sun, October 23, 1983:53). Having decided to close, said counsel for

Thomson, FP made the best deal it could (Toronto Star, October 14, 1983:E3).

The Crown

The Crown in its reply to the motion said collusion, not competition, closed three newspapers and produced monopolies in four cities[42] (Globe and Mail, October 19, 1983:4).

The closing of the three newspapers were not independent decisions, said Crown counsel, but part of a complex and carefully negotiated quid pro quo settlement, in which the chains arrived at mutually favourable market arrangements in Ottawa, Winnipeg and Vancouver. Seized documents revealed the defendants had been discussing their plans long before the transactions took place. The Crown dismissed the defence plea that only the timing of closures had been pre-arranged (Edmonton Journal, October 19, 1983: A8).

> "As far as the Winnipeg Tribune and Ottawa Journal were concerned, these papers were of significant value to their owners because of what they were doing to their dominant competition in those markets ..." (Edmonton Sun, October 19, 1983:40).

Evidence suggested that the whole "Black Wednesday" deal hinged on the closing of the "Winnipeg Tribune" by Southam. Thomson and Southam negotiated on the basis of all four cities, and nothing would get underway until Fisher had authorization to close the "Tribune" (Globe and Mail, October 20, 1983:4).

The "Montreal Star" certainly was losing money, but it closed when it did because of a "consideration" from Southam. It was not unreasonable for the "Star" to close when it did, but if the reason for closing was that it was paid by Southam to do so, that was illegal (Globe and Mail, October 19, 1983: 4). "I say Southam paid the Star to close", said the chief Crown counsel (Edmonton Journal, October 19, 1983:A8). In return Southam received an option to buy the "Star"'s assets, which Southam said it would waive in the interests of a third party. No third party appeared, and both FP and Southam always knew there was little likelihood of one doing so.

> "The Star agreed to close in order to obtain a one-third interest in what was seen to be a highly profitable surviving paper. The Gazette forced them to close ... cash for assets and a continuing interest in the Gazette. I say it closed because of considerations offered. If it (Star) closed with no deal, there would be no charge" (p. A8).

The timing was dictated by an ultimatum from Southam:

> "The Gazette, in effect, forced them to close ... That's what I say the charge is, and that's what I've proven beyond any question" (Globe and Mail, October 19, 1983:4).

The Crown leaned heavily on corporate documents seized by combines investigators, minutes and memos which revealed the "trader" and "multi-market" mentality of the chains. One such, "The Deal - 4 Parts", was crucial "not for what it says but how it was found". The fact that Mr. Carradine thought it necessary to render that document "unintelligible" indicated he had something to fear (p. 4).

Southam senior officers knew higher profits could be had from the closing of newspapers. The profits to be made were "so enormous that businessmen as sophisticated as these were couldn't put it out of their minds" (Globe and Mail, October 20, 1983:4). They must have been "almost driven" to act as they did (Toronto Star, October 20, 1983:E4).

The Crown disputed the defence contention that for competition to be lessened unduly market survivors must erect barriers to entry by a third party. Where two newspapers compete and one is removed there will of necessity be an undue lessening of competition, because entry is all but impossible (Toronto Star, October 19, 1983:B2). "Enormous natural barriers", such as the lack of presses and high capital costs, ensure monopolies[43] (Globe and Mail, October 19, 1983:4).

The Crown conceded that little evidence had been forwarded to implicate Thomson Newspapers in the Montreal agreement of 1979, or to tie FP to the later bargaining (Globe and Mail, October 20, 1983:4). Nevertheless, there was, the Crown argued, ample evidence to convict on some or all of the charges.

Charges Dismissed

Having heard the arguments, judge Anderson dismissed five of the eight charges. In place of three conspiracy, three merger and two monopoly charges there remained only two conspiracy and one merger charge.

All charges pertaining to the "Montreal Star" closing and all charges against FP were dropped. The Court ruled that the "Star" closed because of financial losses and the decision to close was made prior to any agreement with Southam, who therefore did not pay for the "Star"'s closure. The newspaper was competitively dead despite FP's attempts to revive it, with a "staggering" loss of $16 million projected for 1979. Allowing Southam an option to buy the "Star"'s assets was merely an attempt "to salvage as much as possible from the wreckage" (Globe and Mail, October 29, 1983:5). Overstaffing, paternalistic management, an eight-month strike, a declining anglophone market and competition from the "Gazette" killed the "Montreal Star". There was no evidence FP was involved in the August 1980 agreements.

Both monopoly charges were dismissed. These referred to the "Winnipeg Free Press" and "Montreal Gazette"'s sole occupancy of their respective markets after "Black Wednesday", but judge Anderson said the Crown had not shown that public detriment had resulted. Public detriment must be shown over and above the absence of competition. The Irving case had shown that a monopoly did not necessarily imply public detriment, and there was no evidence the monopolies had or were likely to be operated to the public detriment. The court rejected the Crown's assertion that detriment was to be found in a comparison of the monopolies with benefits that emanated from competition. It was the operation of the monopolies that had to be examined and "a comparison with the situation where there was no monopoly is not helpful" (p. 5).

Two of the three merger charges were dropped since there was no evidence of public detriment in Southam gaining full control of the two Vancouver dailies. Southam's acquisition of the "Montreal Star"'s assets did not constitute a merger as Southam did not "acquire a business", the "Star" having closed some seven months before Southam exercized its option to buy. One merger charge remained because there was evidence of public detriment when the "Winnipeg Tribune" closed and sold its assets to Thomson.

The Case for the Defence

Encouraged by what was seen as a "major victory" (Globe and Mail, October 29, 1983:5), defence counsel for Thomson, Southam and four subsidiaries proceeded to present its case on the remaining charges. It did so by calling Thomson chief executive John Tory and Southam president Gordon Fisher to the witness stand to answer Crown allegations concerning their meetings in 1980.

Tory acknowledged he had a first meeting with Fisher early in March, which he described as a "feeling-out sort of session" (Globe and Mail, November 2, 1983:11), but disputed Fisher's account of it in his March 5 memo (Edmonton Journal, November 2, 1983:A2). Tory denied the discussion took place on the basis of a proposed "package" deal, although the word appeared in Fisher's memo (Globe and Mail, November 3, 1983:11). Nor was there talk of "rationalization", although Fisher referred to "rationalization of the newspaper market". Tory was "... surprised to see that ... I did not recall that sort of discussion myself" (Globe and Mail, November 2, 1983:11). He said he took no notes at the meeting, but denied the March 5 memo, written two days after the meeting, described what was implicit in the talks (Globe and Mail, November 3, 1983:11).

The Crown suggested Thomson's removal from Ottawa was greatly beneficial to Southam, encouraging them to cease publication in Winnipeg. "I never looked at it that way", said Tory; Thomson had never really considered keeping the "Journal" open. On the other hand, the "Winnipeg Free Press" earned $11 million in 1982, a "dramatic increase" over previous years. Tory agreed, "some considerable part of that" was due to the "Winnipeg Tribune"'s closure (Globe and Mail, November 3, 1983:11).

The closing of the "Winnipeg Tribune", said Fisher, was not conditional on prices being negotiated for Thomson's holdings in Montreal and Vancouver, or the closing of the "Ottawa Journal" (Toronto Star, November 5, 1983:D8). He had asked his board of directors to consider the matter of the "Tribune" on its own merits. Fisher agreed the minutes of the July 30, 1980 board meeting were inconsistent with his testimony. The minutes connected the Tribune's closing to the purchase of Thomson interests in Montreal and Vancouver.[44]

An attempt to revitalize the "Tribune" had failed and heavy losses continued, said Fisher. The decision to close, Fisher insisted, was motivated solely by newspaper economics, and the sale of "Tribune" assets to Thomson was not intended to exclude future competition from Winnipeg (Toronto Star, November 8, 1983:D2). As a single legal document had been drawn up to handle the Thomson sale of assets in Montreal and Vancouver, as well as the sale of the "Winnipeg Tribune"'s assets by Southam to Thomson, Fisher said he could not sign the document until the Southam board agreed to close the "Tribune", and they only did so on August 26, 1980 (p. D2). The document was held in escrow until agreement was reached on all matters discussed (Edmonton Journal, November 8, 1983: A3). The Montreal and Vancouver situations were resolved at this time because both sides were unhappy with the partnership in Pacific Press, and Southam wanted to end Thomson's involvement in the "Montreal Gazette" (Globe and Mail, November 5, 1983:4).

Final Submissions

The Crown urged the court to put more emphasis on seized documentary evidence which spoke of "packages", "traders" and "rationalization of markets", than on the testimony of Fisher and Tory.

> "I'm not asking you to find that Mr. Fisher and Mr. Tory told lies in the witness box ... But you're entitled to consider the extent to which their evidence is coloured by their conviction that they did not intend to break the law" (Globe and Mail, November 11, 1983:8).

Information exchanged was of a "highly confidential" nature, and "pretty suspicious information to be passing between competitors". The information exchanged were "statements to the effect there would be an abandoning of head-to-head competition" (Edmonton Sun, November 11, 1983: 73).

The evidence, said the Crown, indicates that the agreements in all four cities were connected, or, at least, that the Montreal and Vancouver agreements were contingent on the closure of the "Winnipeg Tribune" (Globe and Mail, November 11, 1983:8). If financial considerations were Southam's only concern the "Tribune" would have closed long before it did. In fact it was kept going until its closure would earn Southam benefit in other markets (Edmonton Journal, November 11, 1983:A2). It was no defence to say the "Journal" and "Tribune" had to go sometime. "It's no defence in a murder case to say the deceased were going to die anyway" (Toronto Star, November 11, 1983:E5).

Defence counsel contended the Tory-Fisher meetings were "quite proper" and no confidential information was exchanged (Edmonton Journal, November 15, 1983:A10; Edmonton Sun, November 15, 1983:37). Counsel conceded that Tory's disclosure precipitated "a re-examination of the situation in Winnipeg" by Southam (Toronto Star, November 16, 1983:B2). Counsel for Thomson called this "conscious parallelism" in which one competitor adopts the practice of another, and that was not illegal (Toronto Star, November 15, 1983:D10).

Southam's counsel said the term "rationalization" in Fisher's March 5 memo referred only to the possibility of joint publishing arrangements in Ottawa and Winnipeg, similar to that in Vancouver (Globe and Mail, November 16, 1983:4). The owners had tried to keep the "Journal" and "Tribune" alive, but concluded the markets could not support competing newspapers. An attempt to rearrange the Vancouver partnership was also unsuccessful.

Both counsel "dwelt at length" on the idea that Tory and Fisher must be presumed to have been lying under oath if the Crown's case was to be accepted (Edmonton Sun, November 16, 1983:41). Thomson's counsel pointed out that the Crown had not questioned the truthfulness of the two men in his cross-examination, yet later asked the court to disregard their testimony. "If their evidence is not untruthful we are left with the Crown's suspicion ... and that is unfounded".

Evidence had shown that markets the size of Ottawa and Winnipeg were unable to sustain two broadsheet newspapers; one inevitably became a junior competitor, largely because of competition from other media which attract revenue once accruing to newspapers. If one of two newspapers shuts down, therefore, competition has not ended. As far as newspapers were concerned, however, the market decreed "that dueness was only one paper" (Globe and Mail, November 16, 1983:4).

Counsel for Southam belittled the fact that some documents entered as Crown evidence were found in a shredded condition, and that Southam vice-president Carradine had been seen destroying one such document.

> "If that's a man who thought he was hiding a crime, he's not a very sophisticated man, let alone a

sophisticated businessman" (Globe and Mail, November 17, 1983:20).

The Crown: Final Reply

The Tory-Fisher meetings in 1980 were premised on rationalizing the various newspaper markets, in order to end head-to-head competition between the chains. While they may have tried to obey the law, "in effect they attempted to blind themselves to the reality of what they were doing". The two must be presumed to have known that the consequence of their actions was an undue lessening of competition (Toronto Star, November 17, 1983:C2).

The public was entitled to have competition free from agreements between owners that raise profits by closing newspapers. The market, not collusion between powerful newspaper chains, should determine how many daily newspapers Canadians read.

The Crown dismissed defence pleas that the chains sought alternatives to closing the Ottawa and Winnipeg newspapers. All the alternatives the chains had in mind involved an end to direct competition between the chains (Globe and Mail, November 17, 1983:20).

Judgement

After 30 days of trial proceedings the verdict was delivered on December 9, 1983. Judge Anderson ruled there was insufficient evidence to substantiate the three remaining charges. The Crown had based much of its case on inference, and the court rejected all of it.

> "He said that after looking at the evidence he had to choose between believing that the documents involved in the transactions were a sham, and that company officials committed perjury during the trial, or that the documents[45] accurately reflected the true nature of the deals" (Globe and Mail, December 10, 1983:1).

Tory and Fisher's testimony, said the judge, gave a "reasonable explanation of the impugned events". Judge Anderson was persuaded by the "entirely open fashion" with which the deals were conducted, with "prompt and full disclosure to anyone who was interested ..." (p. 1). The accused made numerous disclosures of their plans and notified regulatory authorities of them. "That is not the sort of conduct one would expect to find exhibited in criminal activity" (Edmonton Journal, December 10, 1983:A8).

There was "overwhelming evidence" that both the "Journal" and "Tribune" had not been economically viable for years. The groundwork for the August, 1980 agreements was laid in January of that year when Thomson acquired FP.

> "It is no part of the Thomson philosophy to subsidize losers ... and partnership is not in the Thomson way ..." (Globe and Mail, December 10, 1983a:5).

Southam knew the "Ottawa Journal" was losing money and, since Southam's "Winnipeg Tribune" was in the same situation, the only question was when it was all going to happen. The Court accepted Fisher's explanation that the whole constellation of agreements took place on the same day because it was better to have "one great big mess" than a series of little ones (p. 5). The closures were nevertheless independently arrived at, and even the decision to close the newspapers on the same day was, in judge Anderson's view, "logical" (Toronto Star, December 10, 1983:A3).

The judge was also satisfied that Thomson's closure of the "Ottawa Journal" and the sale of 50 per cent of Pacific Press were not contingent on Southam's willingness to remove itself from Winnipeg. Nor was the sale of the "Tribune"'s assets to Thomson part of Southam's agreement to close the newspaper (Edmonton Journal, December 10, 1983:A8).

In any case, Thomson's purchase of the "Tribune"'s assets did not constitute the "acquisition of a business" required for a merger conviction, since the newspaper had ceased publication some hours before. Therefore Thomson engaged in "the purchase of assets of a defunct business and not a going concern" (Globe and Mail, December 10, 1983a:5).

The Crown had placed much weight on the contents of 230 documents removed from the defendants' premises. However:

> "... they are equally susceptible to being read as pertaining to the occurrence of the events as relied upon by the accused as they are to being read as pertaining to the conspiracy as alleged" (p. 5).

The judge gave little credence to the "trader theory" mentioned in several documents. Whatever part it played in the mind of FP president Currie, "it played none in the thinking of Tory and Fisher". The word "rationalization" found in Fisher's March 5 memo was capable of an interpretation other than conspiracy.

What of the document destroyed by Carradine? There was a "perfectly logical explanation" for that.

> "Mr. Carradine may have considered the calculations were sufficiently confidential that he didn't want people to see it, even his own staff" (p. 5).

Why, in the last fortnight judge Anderson had himself destroyed "reams of paper", not because it was incriminating "but because I didn't want anybody to see it".[46]

Appeal Withdrawn

The Crown had 30 days to appeal. A notice of appeal on three counts (one merger and one monopoly count pertaining to the events in Montreal and one merger count arising from the closure of the Winnipeg Tribune and sale of assets) and an application for an extension of the filing period was entered. However, after reviewing the decision it was decided on February 28, 1984 to abandon the appeals.[47] The Crown had earlier entered a stay of proceedings in respect of the obstruction charge against William Carradine (Annual Report, Director of Investigation and Research, 1983-1984: 60).

PACIFIC NORTHWEST BUS CO. LTD.

Background

The meagre facts as presented in the 1985-1986 Annual Report are as follows. An inquiry by the Director commenced in March, 1982 after a complaint was received from a small sight-seeing tour operator in Vancouver, which alleged that Gray Line of Vancouver, owned and operated by Pacific Northwest Bus Company "was engaged in activities in order to establish a monopoly in the sight-seeing tour market in readiness for Expo '86" (Annual Report, Director of Investigation and Research, 1985-1986:57). In the course of the inquiry the records of the company were obtained and examined.

Adjudication

On February 13, 1985 the evidence was referred to the Attorney General of Canada and an Information was laid on July 16, 1985. On the same day, an Order of Prohibition was granted by the Court. The Order restrained the bus company from any action constituting an offence under section 33 of the Combines Investigation Act, for as long as the company controlled or substantially controlled the sight-seeing tour market in the Greater Vancouver area.

The Order prohibited: (1) restrictive agreements with hotels and other sales locations concerning sale of products or of advertising or promotional material, which prevented the hotel from entering into similar contracts with competitors of the bus company, (2) the removal or interference with competitors' advertising, (3) offering products at "unreasonably low prices", with the purpose of "substantially lessening competition" or eliminating a competitor, (4) entering agreements with competitors or potential competitors with the object of preventing or lessening competition unduly, or to prevent entry into the market, (5) amalgamating or otherwise gaining control of any competitor, or the sight-seeing licence authorities of any competitor, in a two-year period from the date of the Order (6 C.P.R. (3d.) 265-267).

The Court directed that all employees should be given a copy of the Combines Investigation Act and the stated policy of compliance within 60 days. All future employees should also receive copies. The Director was to receive the names and addresses of all employees within 70 days (and future employees after that time), and was to be notified of any applications by the respondent before the Motor Carrier Commission of British Columbia. In addition, the Director was to receive a copy of every written contract and be notified of any unwritten agreements, for a five-year period from the date of the Order, which had a life of seven years. The Order might be altered or rescinded only if material circumstances should change, in particular the emergence of new competition (pp. 267-270).

FOOTNOTES

1 The Irving case was under appeal at this time to the Supreme Court of Canada, and was not resolved until November, 1976. For that reason the case is discussed later in this chapter.

2 Allied and Cominco were also acquitted on both conspiracy charges.

3 At the close of his judgement Mr. Justice Pennell explained the delay "by the interposing of other matters of immediate urgency which clamoured for attention" (34 C.C.C. (2d.) 544). Sentencing was further delayed until April, 1977 (Annual Report, Director of Investigation and Research, 1976-1977: 32-33).

4 This was the reading given in the second of the cases considered here, that of British Columbia Sugar Refining Co.

5 This interpretation, which emerged from the Irving trial, allows defence counsel to create the "reasonable doubt" required for an acquittal. It means that even an absolute monopoly, as in the Irving family's capture of all five English language newspapers published in New Brunswick, need not be an offence under the Act.

6 There was no appeal by the defendants against the conspiracy conviction nor against the sentences by which Canadian General Electric was fined $300,000, Westinghouse $150,000 and GTE Sylvania $100,000. One factor in this decision may have been the legal costs already incurred. Canadian General Electric had already spent over one million dollars (Gorecki and Stanbury, 1979:165).

7 According to Francis (1986:17) Irving had monopoly control as early as 1952.

8 The judge described the documentary evidence entered by both counsel as "unbelievably voluminous". The Crown's evidence amounted to well over 9,000 pages and the defence entered over 1,400 pages (16 C.C.C. (2d.) 54).

9 At the beginning of his judgement Mr. Justice Robichaud reminded counsel that on the opening day of trial proceedings he had "almost pleaded with them to relieve me of this burden". He gave as one of his reasons for being excused his conviction from a reading of the transcript of evidence "that some political

undertones would be aired during the trial ... My apprehension proved to be right. The evidence and material before me did reveal that political pressure and interference lay behind the facade of these proceedings. It is a fact that political undertones, as well as overtones, were noticeable at the hearing" (16 C.C.C. (2d.) 60).

10 Apropos their role as channels of information and shapers of public opinion the Royal Commission on Newspapers (1981:177) found the Irving newspaper group to be "chiefly noteworthy for their obeisance to every industrial interest". Another opinion was that Irving newspapers had not "annoyed anyone important in years" (Nowlan, 1980:63).

11 Mr. Costello's advice to K.C. Irving was contained in handwritten notes compiled by Costello after the purchase of the "Daily Gleaner" in 1968, and in the knowledge that the Special Senate Committee on the Mass Media (Davey Committee) would question Irving employees. In his notes Costello says his employer's position cannot be defended, that publishers and editors across the country did not condone the monopoly, that a fight on the issue would be lost and that the "Daily Gleaner" should be sold as quickly as possible to forestall a possible prosecution under the Combines Investigation Act. Costello remarks: "How can I say we serve public (sic) better without competition" (16 C.C.C. (2d.) 96-97).

12 The grounds for appeal embraced errors in law by the trial judge, and the plea that the verdict was in conflict with the weight of evidence (23 C.C.C. (2d.) 483-484).

13 The two Moncton papers have since been merged (Maclean's, June 24, 1985:54). The Royal Commission on Newspapers (1981:59) commented in regard to the test of detriment. "Such a test applied to newspaper competition, where the potential harm in the lessening or elimination of competition is the undermining of one of the requisites of democracy, is ludicrous".

14 The only particular of detriment offered by the Crown had been lessening of competition (23 C.C.C. (2d.) 507). The Court ruled that Mr. Costello's remarks on the inadvisability of retaining ownership of the "Daily Gleaner" in which he had referred to the province being "without competition" was simply a case of playing "devil's advocate" (pp. 491, 497-498).

15 Among the public benefits argued at trial by the defence were the transfer of two of the newspaper companies to new premises featuring modern printing equipment, the

continuance of two money-losing morning newspapers and the reinvestment of profits in the province (16 C.C.C. (2d.) 103).

16 This case was not recorded in any legal journal and therefore details of the adjudication are taken almost entirely from press reports in four newspapers. These are: the Edmonton Journal, Edmonton Sun, Toronto Star and the Globe and Mail.

17 At the time of the trial Thomson owned 40 daily newspapers in Canada with 21 per cent of circulation, while Southam had 15 dailies with 28 per cent of circulation (Toronto Star, September 18, 1983:A18).

18 The subsidiaries were: FP Publications Ltd., FP Newspapers Ltd., Canadian Newspapers Co. Ltd., Vancouver Newspapers Ltd., and Replacement Sales Co. Ltd. (Edmonton Sun, September 18, 1983:45).

19 Subsection 41(1) reads: "No person shall in any manner impede or prevent or attempt to impede or prevent any inquiry or examination under this Act" (R.S. 1978, c. s. 41(1), C-23).

20 Due to the complexity of the case and because some charges related to specific markets, the Crown discussed each newspaper market separately.

21 On the opening day of proceedings the Crown indicated it was abandoning "its earlier theory" that events in all four cities were related, and requested that one of the eight charges be amended, to draw a distinction between the "Montreal Star" closure and the agreements implemented in August, 1980 (Toronto Star, September 20, 1983:A15).

22 The memo was found in the office of a senior vice-president of Southam, George Meadows. A combines investigator would testify that Meadows told him: "It was all worked out; it was all pre-planned" (Globe and Mail, September 28, 1983:3).

23 Details of the search of corporate offices would be given in testimony by two combines investigators, one of whom testified that on passing Carradine's office he "saw Mr. Carradine ripping up a document and placing it in the waste paper basket" (Globe and Mail, September 28, 1983:3). Another investigator would testify he found two garbage cans containing destroyed documents in Carradine's office; magazines were placed over the cans. The investigator removed the torn documents from the office, and when he returned, he said, "I noticed more shredded documents in a can I had emptied" (p. 3). The same investigator

also testified that while examining documents on Carradine's desk: "I noticed he'd taken a page out of a binder (he was working on) and placed it in his waste basket" (Toronto Star, September 28, 1983;F10). It was for these actions Carradine was charged with obstructing the investigation.

24 Southam was afraid that if the "Star" closed Quebec labour laws would compel Southam to take on "Montreal Star" workers, along with their labour contracts. For this reason Southam would wait until April, 1980 before exercizing its option to buy the "Star"'s presses, land, buildings, and name (Globe and Mail, September 23, 1983:5).

25 Southam had taken every legal precaution ever since the 1977 confidential letter to FP. At the Southam board meeting on July 18, 1979 a director expressed the view that "bad public relations in the city (likely would be) short-lived", that the company need not fear government reaction and that "the PQ would be pleased to see (the) Star go". The "Montreal Star" was an opponent of the Parti Quebecois government's separatist policies (Edmonton Sun, September 23, 1983: 73).

26 A lawyer in the employ of Southam agreed the clause was intended "at least partly" for combines reasons, but denied that it was wholly "window dressing". Why Southam, who had sold one-third of its "Gazette" in order to get rid of the "Star", would be hopeful of acquiring another competitor was not explained. Asked if Southam thought the document containing the clause was likely to be seen by combines officials, the witness replied: "There was always that possibility" (Globe and Mail, October 7, 1983:3).

27 A memo seized from Southam's head office asked a pertinent question. "Why enter an agreement with FP when presumably The Star would have eventually folded?" The answer given was that the market had always been "very difficult" for the "Gazette" and considerable sums of money had been lost in recent frenetic competition. Above all, there was the fear that the "Star", for so long the dominant newspaper in Montreal and with publishing facilities superior to those of the "Gazette", might regain its former status.

"We could not run the risk that The Star might once again gain the upper hand ... If The Gazette was losing money in first place, it would lose even more when it was in second" (Edmonton Journal, September 23, 1983:A3).

28 Witnesses testified that the "Gazette" deteriorated in quality "despite a conscious attempt to upgrade itself"

after the "Star"'s disappearance (Edmonton Journal, October 5, 1983:A8). The loss of the "Star" was a "devastating blow" to anglophones in Quebec (Globe and Mail, October 6, 1983:5).

29 The dominant newspaper in Ottawa at that time was Southam's "Ottawa Citizen", but the "Journal" had recently embarked upon a campaign to increase circulation (Toronto Star, September 27, 1983:B3).

30 Nonetheless, the March 3 meeting had been auspicious: "Generally I was encouraged by what appeared to be some desire on Tory's part to consider rationalization in markets where one or other of us had unresolved problems ... With respect to Thomson/FP I do not foresee any deals that will raise major philosophical issues. However, any further rationalization will be politically sensitive" (Toronto Star, September 27, 1983:B3).

31 Thomson exercised the option in July and sold it to Southam on August 27, 1980 (Globe and Mail, September 29, 1983:3).

32 Minutes of a Southam board meeting on July 30, 1980 show that Fisher was authorized on that day to negotiate with Thomson for the closure of the "Tribune", and the expansion of Southam's holdings in Pacific Press and the "Montreal Gazette" (Globe and Mail, September 28, 1983:3).

33 In reply to Southam's counsel Currie denied that "trader" meant simply an agreement whereby the "Journal" would be printed on the "Citizen" presses while Southam's "Winnipeg Tribune" would be produced at the "Winnipeg Free Press" plant. When counsel read from a transcript of Currie's 1980 examination by the Restrictive Trade Practices Commission, which mentioned a possible printing agreement, Currie said "both are correct" (Globe and Mail, September 30, 1983:5).

34 FP's attitude toward the "Journal" was entirely consistent with the advice it was receiving. A letter dated November 16, 1978 from a consulting firm reads: "We are convinced that FP will have to withdraw the paper eventually" (Edmonton Journal, September 22, 1983: A2). The letter advised that Ottawa was not large enough to support two English language dailies, but recommended that FP slow Southam's growth in Ottawa by "keeping a trader for the future, especially until Winnipeg begins to resolve itself" (Toronto Star, September 22, 1983:A19).

35 After Thomson acquired FP Currie passed on to Thomson

FP's assessment of the Ottawa situation. Tory testified that Thomson placed a "zero valuation" on the newspaper (Toronto Star, November 2, 1983:E3), and soon after acquiring it decided that a buyer should be sought (Edmonton Sun, November 2, 1983:39). Tory said he approached eight potential buyers without success, despite offering it to the publisher of the "Toronto Sun" for one dollar. Projected losses for the newspaper in 1980 were $5 million (Toronto Star, November 2, 1983:E3).

36 Rennie was handed an announcement to place in the last edition "as close to press time as possible" to avoid upsetting the 375 employees, and "to guard against interference with the closing" (Edmonton Sun, October 4, 1983:18). No attempt was made to find work for the employees at other Thomson newspapers. Ken Thomson, inheritor of his father's conglomerate empire, commented "each one has to find his own way in the world" (Goldenberg, 1984:73).

37 At a meeting with Ken Thomson, the owner of Thomson Newspapers, immediately after the FP takeover, Ted Bolwell, editorial director of FP, told Thomson that he would try to buy the "Journal" if Thomson intended to sell, but Thomson told him he had no such plans. Three months later Bolwell was told he no longer had a job (Edmonton Journal, October 4, 1983:A3).

38 This can be seen in an October, 1978 memo from the "Edmonton Journal" publisher to Southam's Fisher: "How do we achieve an accommodation in Winnipeg without balancing it against reciprocal moves in Calgary, Ottawa and Montreal? In truth, we are in a game with no winners, only losers" (Edmonton Journal, September 22, 1983:A2).

39 Nevertheless, ever mindful of political implications, when closure came it was felt necessary to seek out Manitoba premier Sterling Lyon and Prime Minister Trudeau in order to impart to them the corporate rationale (Globe and Mail, September 28, 1983:3).

40 The Director of Investigation and Research had contended Pacific Press was a "merger, trust or monopoly" and the Restrictive Trade Practices Act issued a report in 1960. The Commission found, inter alia, that by arrangement general advertising appeared in both newspapers and that competition was found only at the publishing level. Fearing that litigation might precipitate the disappearance of one of the newspapers the situation was allowed to continue, subject to surveillance and reconsideration (Lyon, 1963:169-172).

41 One of the shredded documents from Southam vice president Carradine's waste basket contained the notation, with reference to Vancouver, "all-day paper" followed

by the word "premature", from which the Crown surmised that the business of "rationalization" had not been completed, in Southam's view (Globe and Mail, October 20, 1983:4).

42 At this point judge Anderson interjected: "I have been troubled by something from the outset of this case ... by the fact one could conclude on evidence that the financial positions of the Ottawa Journal and the Winnipeg Tribune were such that no sensible businessman would continue their operation". The Crown replied: "None of these papers were so critically ill that reasonable management could not have continued their operation" (Edmonton Sun, October 19, 1983:40).

43 The Crown urged that the Irving newspaper case not be seen as a precedent, since there was no conspiracy charge in that trial and no newspapers were closed (Edmonton Journal, October 20, 1983:A9).

44 "The president and (Southam lawyer Ted) Donegan outlined a proposal to cease publication of the Winnipeg Tribune and to acquire a greater interest in Pacific Press Limited and Gazette Montreal Limited, the minutes read" (Toronto Star, November 8, 1983:D2).

45 The "documents" referred to by judge Anderson are the legal documents drawn up by corporate lawyers to ratify the August, 1980 agreements. No mention was made in this context of the seized documents, many of which flatly contradicted the testimony of the two chief defence witnesses.

46 Minutes after the verdict both Tory and Fisher expressed the view to reporters that the proposed Canada Newspaper Act was, in Tory's words, "a dead duck" (a correct assumption). Asked whether the government's decision to prosecute was "logical", Tory replied: "Perhaps they didn't understand what happened as the judge clearly does".

In a meeting with the media immediately after the verdict Crown counsel commented that the decision might: "... encourage Parliament to have a look at changing the legislation. Maybe these cases shouldn't be decided in a criminal court, where the burden of proof is beyond a reasonable doubt" (Globe and Mail, December 10, 1983a:5).

47 The Chief Crown counsel explained: "My analysis of the findings on the evidence by the trial judge was that the Court of Appeal would not change the verdict and in all the circumstances the continuing of this prosecution was not justified" (Globe and Mail, February 29, 1984: 10).

VIII. CROSS-CASE ANALYSIS

Introduction

The exhaustive sample comprises a dozen post-war anti-combines cases, susceptible to analysis on a number of levels. The sample may be dichotomized as "in-court" (eight cases) and "out-of-court" (four cases), permitting within-group and between-group comparisons.

Within the in-court cases two produced convictions and six resulted in acquittals. Here too, within-group and between-group comparisons might be usefully conducted. Since two of the cases involved newspaper chains as defendants and both were criminally tried (and acquitted), these subjects will be considered in juxtaposition.[1] Attention will also be given to the matters of punitiveness of sanctions and the time taken to adjudicate matters. The cases conducted by criminal trial will be considered first.

CRIMINALLY ADJUDICATED CASES

Guilty Verdicts

Of the sample of 12 cases just two resulted in a conviction before a criminal court.[2] An examination of the salient facts of the two cases reveals circumstances in common. Both accused, Eddy Match and ERCO, were sole producers in their respective markets at the time charges were laid (in cases where even a modicum of competition, actual or "potential", was to be found, the courts acquitted the defendants). Having attained the status of absolute monopolists, the defendants resorted to strenuous and varied means to ensure that the monopoly was perpetuated, principally by acquiring new competitors. The broad strategies employed (such as import restrictions, opting out of markets, differential pricing and price fixing just below tariff level) are attributable to the common circumstance that both defendants were subsidiaries of foreign multinational parents, who were the source of the illegal behaviour of their Canadian properties. The convictions were facilitated by the Crown's ability to show that the detrimental consequences for consumers emanated directly from the mergers in question. In the Eddy Match case this was not necessary for a conviction and only became so with the beer and sugar cases of 1960, in which it was ruled that evidence of anti-competitive activities prior to the establishment of a monopoly was not admissible. In the Eddy Match case such evidence was an alternate criterion of proof.

In each case it was apparent to the court that the accused were prepared to resort virtually to any illegal means to sustain their monopolies. The monopolies were illegal also in their origins, in that they were created from mergers whose object was the deliberate elimination of competition. Agreements whose purpose was to secure a virtual monopoly were sufficient for a conviction, and in each of the cases such agreements had been substantiated.

In both matters prosecution was preceded (and facilitated) by an official report highly damaging to the defendants. It was these publications that revealed the use of tariffs to maintain high prices, and simultaneously to exclude competition. In the Eddy Match case the international cartel which controlled the company made a conscious decision not to allow imports, and to manufacture in Canada only for the home market. In such circumstances the entry of new competition, domestic or foreign, was unlikely.

Documentary evidence in the form of inter-corporate memoranda of an incriminating nature was available to the Crown, in each case a "smoking gun", which eliminated the margin of "reasonable doubt". A "common sense" approach was evident in the judgements, in that the law was perceived as unambiguous and the existence of a monopoly within the terms of the Act was not questioned. A final similarity between the two judgements was that, in light of the duration of the monopolies and the inestimable sums in excess profits earned by the convicted parties, the penalties imposed were comparatively non-punitive.

A number of important differences between the two proceedings should be noted. Whereas the trial of Eddy Match was a vigorously contested affair in which the defendant challenged the prosecution on a variety of matters of fact and law and pursued them in a higher court, ERCO elected to plead guilty to three of the charges in exchange for the withdrawal of the remainder, 10 years after the acquittals in the brewing and sugar refining cases.

Presumably, the company acted on legal advice in the knowledge that, unlike the earlier unsuccessful prosecutions, theirs was an absolute monopoly (the Irving higher court rulings some five years later could not have been anticipated).[3] A long, complex and expensive adversarial process lay ahead, with the possibility of convictions on all charges. In consideration of the time and trouble saved, the Crown (which does not appear to have been eager to contest all the charges either), withdrew two of the monopoly charges and did not object to a lenient fine of $40,000 (an unlimited fine was available to the Court) in conjunction with an Order of Prohibition.

A gap of 19 years lies between the convictions of Eddy Match and ERCO but, more significantly, during that time the Combines Investigation Act had come to be viewed by the Crown as an unreliable tool of enforcement for merger and monopoly offences. The Eddy Match prosectuion was only the second[4] under the 1927 Act, and therefore the Crown approached the case in the context of an essentially untested law. In later years Crown counsel would exercize greater caution in their selection of "winnable" cases, as the courts adopted an increasingly restrictive reading of the statute. In 1951, however, the law was seen as more substantive and encompassing of anti-competitive practices, in which a tacit agreement to preclude or limit competition, inferred from all the evidence, was sufficient for conviction. This was regardless of whether the agreement operated to that end and regardless of whether parties participated in the formation or operation of the combine (merger, trust or monopoly) or both. A combine designed for that purpose was illegal in all its phases and it was sufficient if, by the nature of the agreements contained therein, the combine could be regarded as one likely to result in public detriment. (It is clear from the above that a valid consideration for the Court was the intent of the accused, an issue which was ruled inadmissible beginning with the beer case in 1960). To that end, collusive and other anti-competitive practices as instances of specific detriment (such as purchasing competitors' plants and closing them down) could be included in the court's assessment of public harm. A combine need not exercize monopolistic control but merely "substantial control" of the relevant market, and, in the latter case, the degree of difficulty of entry would be incorporated into the court's deliberations. Many features of this criteria would be whittled away in subsequent judicial pronouncements, a development which makes problematic the enumeration of factors distinguishing the two guilty verdicts from the six acquittals. To explain the convictions in terms of monopoly control, documentary evidence of collusion, counselling to destroy evidence and concealment of monopoly, only begs the question: "why did not the same conjunctures, reappearing in later and intervening cases, impede acquittals?"

Not Guilty Verdicts: The Evolving Judicial Interpretation of the Combines Investigation Act

Of the eight cases which were adjudicated through criminal justice procedures, six resulted in acquittals. When these six cases are examined, the principal reason for the virtually unbroken series of adversarial defeats between 1960 and 1983 (punctuated only by ERCO's plea of guilty to reduced charges in 1970) appears to be the increasingly restrictive judicial interpretation by trial judges, supported in one instance by the higher courts, in contrast to the non-problematic, more literal interpretation rendered in the Eddy Match case. Each exacting reading of the Act with regard to merger and monopoly became a precedent for those that followed, until it became difficult to visualize a scenario in which section 33 of the Act could be enforced. After the verdict in the Thomson-Southam newspaper case section 33 was effectively null and void, and the need for a complete redrafting of competition law was apparent to all.[5]

The move to an exclusionary and confined interpretation began with the trial of Canadian Breweries. Up to that time the law had remained comparatively untested, with one acquittal and one conviction on record. Then in 1960 the Canadian Breweries judgement suggested that the Act was more of a blunt instrument than a surgical tool, in differentiating between acceptable and proscribed monopolies. Many aspects of merger formation, which had been thought by regulators to be pertinent to the courts' deliberations, were jettisoned by Chief Justice McRuer.[6] The Court focused on the actual operation of the merger itself and discarded such "extraneous" matters as the intent of the accused in conducting a long series of mergers over a 30-year period, or evidence of collusive activities preceding (and perhaps contributing to) the merger, which brought the matter to court. In doing so, the Court departed from the judgement in the Eddy Match case, in which that Court had declared that "the matter to be considered is the end sought by the offender without regard to the actual end attained" (104 C.C.C. 42). Now the Court ruled that detriment could never be presumed but must be established as fact, and as a derivative of the merger itself. Such an approach presented procedural dilemmas for the Crown.

> "Such proof is difficult to establish, for the Crown faces an evidentiary blockade: it cannot bring to bear any evidence which might show the intention of defendants to operate 'to the detriment or against the interest of the public'. Intent is irrelevant according to the leading authorities. And, since intent is irrelevant, evidence of collateral agreements which might show the intent of the parties is ... also inadmissible" (Cody-Rice, 1980:130).

Since the Act refers to takeovers which are "likely" to be operated to the public detriment the Crown is compelled to enter into speculation as to future effect, to assess the "balance of probability", when the criteria in criminal matters is "proof beyond a reasonable doubt" (p. 131). Yet the Act appears to call for such a prospective reading (Reschenthaler and Stanbury, 1977:166). With the inadmissibility of intent, proof of likely detriment can only be obtained by finding another case, identical in all essential aspects, whose consequences were detrimental, no easy task given the infrequency of merger convictions.

As events preceding the merger or monopoly were ruled irrelevant, even the deliberate elimination of competition (a feature of both the Eddy Match and Canadian Breweries cases) was now inadmissible in considering the nature of the merger.

The Eddy Match decision had made it abundantly clear that all monopolies were not prohibited. A "good-bad monopoly" distinction was drawn, and, from the Canadian Breweries case onward, the latter type were distinguishable by proof of unfair trading practices subsequent to the formation of the merger, such as predatory pricing. This reasoning also places evidentiary barriers in the path of a successful prosecution.

> "Since, under the jurisprudence as it has developed, the Crown is not permitted to lead evidence as to collateral agreements, or as to intent on the part of the accused, it seems likely that certain types of evidence of unfair practices might be excluded as well. Hence, showing there had been unfair practices - that is, attempting to establish a "bad" monopoly - could itself be highly problematical. As well, an accused under section 33 is, at present permitted to lead evidence to show that there has been a collateral public benefit[7] ... in defending an allegation that he is operating, or is likely to operate, to the detriment or against the interest of the public" (Cody-Rice, 1981:133).

A potent strain of economic naivety was introduced into jurisprudence by the Chief Justice, which would be complemented in subsequent cases. Price was held to epitomize the state of competition in a specific market. In this instance, because beer prices were officially regulated they were taken to be regulated de facto, despite evidence to the contrary. This tendency to accept matters at face value permitted the Court to find that competition existed, in the face of evidence of collusion between the three large brewers. It was also this ruling which declared obstacles to market entry to be inadmissible, although it had been a material consideration in the Eddy Match judgement.

In addition to all of this, the Court ruled that the term "detriment", contained in seciton 2 of the Act, had "substantially the same meaning" as "unduly" found in section 411 of the Criminal Code (126 C.C.C. 139). This departure from Parliamentary intent would be taken up by Chief Justice Williams in the British Columbia Sugar Refining Company trial six months later, and would remain unchallenged until 1976 by Mr. Justice Pennell in the "large lamps" case, who found it "contrary to the plain wording of the Act" (34 C.C.C. 538). Nevertheless, Chief Justice McRuer's ruling on law meant that a merger, to be objectionable under the Act, must be "unduly detrimental" to the public interest, that is, it must eliminate competition entirely or to an extent that permitted a defendant to effect monopolistic control of prices.[8] In future judgements nothing less than that need detain the courts. It was clear, then, that very few mergers fell within the ambit of the law (Drummond, 1972:103).

This innovative judgement received immediate support in the British Columbia Sugar Refining judgement. A merger must grant virtually the power of monopoly, and, (innovating himself) Chief Justice Williams added that the merger must manifest excessive prices or profits as proof of detriment (129 C.C.C. 60). The presence in the national market of corporate entities independent of the accused was "proof" of competition per se. A merger must operate or be likely to operate "unduly to the detriment or against the interests of the public" (129 C.C.C. 16). The possibility that the merger in question was facilitated by collusive activities such as market sharing, base pricing and prices calibrated with tariff levels, was not considered. Indeed, the Court felt the defendant was fully justified in pricing as high as the tariff allowed (129 C.C.C. 47). By this logic there was no loss of competition in the acquisition of Manitoba Sugar.

The rulings in the beer and sugar cases constituted grave setbacks for anti-combines regulation, rendering uncertain the enforceability of the merger and monopoly provisions of the Act. So uncertain was the status of section 33, that the Bureau of Competition Policy gave preference to a policy of consultation and negotiation with corporations contemplating mergers, rather than further test the Act in the courts. For 10 years no merger or monopoly case was prosecuted, and then only when a case involving complete market control and blatant anti-competitive tactics emerged. Even here the Crown preferred to bargain a plea of guilty to some of the charges rather than prosecute the full case.

The significance of the two judgements in 1960 was that a clear signal had been sent by the judiciary to the corporate elite, that all proposed mergers could be undertaken with impunity providing they did not create a power of monopoly for the acquisitor. The way was now open for the frenetic merger activity of the last 25 years which had seen some of the largest aggregations of assets in the history of the Act.[9] (Annual Report, Director of Investigation and Research, 1978-1979:13-25; Maclean's, August 26, 1985: 26-28).

The judgements concerning the beer and sugar refining industries had shifted the philosophical axis of the Act with reference to merger and monopoly, but it was the first of the newspaper cases that appeared to render section 33 virtually moribund. As in the ERCO case, the attainment of an absolute monopoly by the Irving interests (of the English language newspaper market in New Brunswick) presumably gave heart to a demoralized regulatory staff, and instilled confidence that if detriment could be proved it must be in a market where all other players have been eliminated. The trial judgement affirmed that perspective, finding all but one defendant guilty on all charges. The ruling was a reversion to the Eddy Match judgement, if anything was intended by "monopoly" in the Act it was absolute market control.

Consequently, the decision of the Supreme Court of New Brunswick that there could be no presumption of detriment, even when competition was extinguished, came as a genuine shock to the Director, his staff and legal advisers. Detriment was still a matter of demonstrable fact. Even more surprisingly, the Court ruled that newspapers could be said to be in competition with one another even when in common ownership, providing they enjoyed editorial autonomy, and the trial court had been satisfied such autonomy did prevail.[10] Prices continued to be the chief gauge of competitiveness and the prices of newspapers had not increased unreasonably. Nor had the amounts charged for advertising. Circulation had been maintained or bettered, and the monopoly had yielded specific public benefits such as the sustenance of two money-losing publications. The monopoly and the merger which brought it into being could not, therefore, be said to have operated unduly to the detriment of New Brunswick readers. To all of this the Supreme Court of Canada unanimously concurred, thereby putting its imprimatur on the post-Eddy Match jurisprudence. What, of course, was not even addressed by the deliberations of the appeal courts was the fundamental question of the advisability of permitting monopoly ownership of a primary source of information, ideas and opinions in a liberal democracy, thereby allowing the monopolist to "shape public opinion" (Francis, 1986:14). The Supreme Court acknowledged that newspapers were qualitatively distinct from other "commodities" under the jurisdiction of the Act, and that at some point jurisprudence should concern itself with the matters of freedom of communication and the defence of democratic ideals. However, the Court did not elucidate since the terms of the appeal did not warrant it.[11]

> "The Supreme Court's decision is a triumph of business power in the context of a strictly construed criminal statute almost totally inappropriate to the task at hand - the evaluation of economic behaviour. In demanding that specific instances of public detriment be proved beyond a reasonable doubt ... the court has refused to see beyond the small (price, advertising rates, and infusions of capital equipment) in a case in which detriment takes the form of the potential to undermine one of the requisites of a democracy - a free and independent press" (Reschenthaler and Stanbury, 1977:163).

The Crown, Reschenthaler and Stanbury (1977) feel, was correct in arguing that the essence of competition in this case was "the reflection of independent points of view in news coverage and editorial comment" (p. 163). The appeal courts also ignored the fact that Irving media interests are concentrated in the largest market areas in New Brunswick, and that media holdings constitute only a small part of the family's conglomerate interests, which include transportation, pulp and paper, mining and petroleum[12] (Royal Commission on Newspapers, 1981:95).

The judiciary has held that the purpose of the Act is to protect the public interest in free competition, yet has refused to look at the broader implications of market power, and this is particularly evident in the Irving case.

> "If one were to adopt the logic of the Supreme Court, one firm could acquire all the daily newspapers in Canada, and, provided the papers were not in direct competition with each other, that the editors were "independent" of the owner and that the papers appeared to give wide coverage of the local and national news, the acquiring firm could not be convicted of a merger or monopoly offence under the Combines Investigation Act. In other words, "benign"

> monopoly is not illegal. One must ask - at what point would the Supreme Court gag? When would they call, "Enough!" At what point does the possession of great economic and political power contravene the public interest? For the Supreme Court of Canada, the ownership of all five English language daily newspapers in the Province of New Brunswick, when combined with enormous industrial holdings, is insufficient to say the public detriment has resulted" (Reschenthaler and Stanbury, 1977:165).

With this decision section 33 became inoperative even for absolute monopolies, providing defendants could satisfy the court that some public benefits accompanied the extinction of competition. A narrow and entirely retrospective view of the Act had been incorporated into the jurisprudence, contrary to the wording of the Act, which speaks of a merger as one by which competition "is or is likely to be lessened to the detriment or against the interest of the public ..." (R.S. 1978, c. s. 2, C-23). Rulings on law had erected evidentiary obstacles to attempts by the Crown to show likely future effects of a merger.

Post-Irving

The successful appeal in the Irving case had cast grave doubts on the operativeness of section 33, and while the Supreme Court was deliberating two other trials were decided in favour of the defendants. In contrast to the other criminally prosecuted cases discussed here, the Crown's contentions against Allied Chemical and Cominco seem comparatively weak in the face of the recent jurisprudence, in that the defence was able to show the presence of potential and actual competition. In view of the general reluctance to prosecute merger and monopoly cases after 1960, it is not clear why this case was prosecuted when, for example, Safeway was not. All specific allegations of detriment were rejected and the Crown was reduced to pleading "potential" detriment, and fatuously arguing that Allied should have sold its product at less than cost in order to sustain competition, a strategy that would have left the accused vulnerable to charges of "unreasonable prices".

In the second matter resolved in the intervening period between the Irving appeals, Canadian General Electric, Westinghouse and GTE Sylvania, despite having 95 per cent market control, participating in collusive actions which proved adequate for a conviction on two conspiracy charges, and the Court's rejection of the "unduly detrimental" standard of proof implanted by the breweries and sugar refining cases, were acquitted on the monopoly indictment.[13] Here also the presence of actual competition (even if only a five per cent market share) was enough to obviate a verdict of guilt. The operation of the oligopoly was considered "in the context of the industry" and the homogeneity of the product (34 C.C.C. (2d.) 501). In that context what had been a good prima facie case fell short of the Act's criterion of detriment.

The last case to be assessed, that of the Southam and Thomson newspaper groups, is best examined in relation to the Irving case, and the larger question of the appropriateness of the Combines Investigation Act in assessing the degree of concentrated newspaper ownership harmful to the public interest.

Anti-Combines Law and the Newspaper Industry

The acquittal of the Irving newspaper group, in the first test of the Act's applicability to the press, must have given Thomson Newspapers and Southam Publications cause for optimism when conspiracy, merger and monopoly charges were laid against them in 1981, following the events of "Black Wednesday". If Irving's monopoly of the English language press in New Brunswick did not trouble the highest legal opinions, why should the four monopolies mutually granted by the two largest newspaper chains be any different? It was no longer clear what conjunction of circumstances would survive the courts' scrutiny or whether such a conviction was still attainable. The Irving case had shown the difficulty of proving detriment as fact, and the prerogative of the defence to illustrate public benefits arising from the monopoly, established by the proceedings, created grounds for the "reasonable doubt" sufficient for acquittal.

The Irving decision clarified for the defendants, in the latter prosecution, the likely tangential concerns of the Court in assessing the effect of the monopolies: the price of newspapers, advertising rates, quality and quantity of news and circulation figures. The Court could be relied upon not to address the more fundamental issue of the protection of a diversity of ideas, opinions and sources of information. In all likelihood, newspapers would once again be treated as articles of commerce, graced with editorial autonomy. As has been seen Messrs Tory and Fisher were fully aware of the political[14] and legal[15] implications of their objectives and sought reassurance in both spheres before publicly acting. The Irving judgement assisted Tory and Fisher in their circumvention of the law.

Why, then, were charges laid at all in the Southam-Thomson case? The facts immediately presented themselves as adequate for conviction even within the scope of this increasingly porous statute. There was, first of all, an obvious loss of competition in the disappearance of two big city newspapers, including one in the country's capital. In the Irving matter there were no closures as an immediate result of the creation of the monopoly, while in the latter instance two of the four monopolies were the direct result of what could not unreasonably be held to be a quid pro quo by the two parties. Indeed, there was a blatantly conspiratorial "look" to the whole undertaking and its implementation in a single day, and it was known that the events of August 27, 1980 had been preceded by five months of surreptitious meetings between the president of Southam and the chief executive officer of Thomson. If that was not circumstantially damning enough, the Crown had possession of memoranda in the handwriting of one of the interlocutors, strongly suggesting to the most credulous mind hard bargaining, whose objective was a comprehensive agreement to eliminate competition nationally. Other documents assessed the additional millions of dollars to be had from absolute control of specified markets, all of which came to pass. Correspondents adjured one another to destroy the memoranda which passed between them (a practice which contributed to the conviction of Eddy Match of monopoly and Canadian General Electric and their accomplices of conspiracy), and intra-corporate data had actually been destroyed in the presence of investigators, searching for the evidence those documents contained.

There was clearly an enormous financial incentive for undertaking a calculated risk of criminal conviction. However, recent jurisprudence pertaining to the merger and monopoly provisions of the Act, especially that of the Irving decision, the likely reluctance of the Crown in undertaking the most complex anti-combines prosecution in memory, and the newspaper chains' political connections at the federal and provincial level made the risk an acceptable one.

Nevertheless, when all the facts were considered together the case had a flagrant and outrageous aspect to it, which had triggered a furore, both within the industry and in the political sphere, and precipitated a royal commission whose report denounced the condition of the newspaper industry in Canada. Given the "sensational" nature of the case, not to have responded to the (almost literally) "overnight" restructuring of the Canadian newspaper business would have signalled to the controllers of the media the state's willingness to allow diversity of ownership to pass into history, and would have robbed the legislation of whatever lingering legitimation value it still possessed.

When the trial and judgement are analyzed a number of features are problematic. At the outset the Crown correctly based its case on the highly suggestive content of some 230 corporate documents, expropriated in "raids" by combines investigators; however, the Crown failed to make full adversarial use of that evidence. The defence case largely rested on the testimony of Tory and Fisher, and on their credibility as "pillars of the country's corporate elite" (Globe and Mail, December 10, 1983b:5). There is no question but that they made "good witnesses":

> "Each spent two days in the witness box, where the polite, private-school upbringing of both was evident" (Globe and Mail, December 10, 1983b:5).

The testimony of the two persons most central to the events of "Black Wednesday" was crucial in the defence's attempt to defuse the cumulative documentary evidence, much of it in Fisher's own hand. In a sense Fisher "testified" twice, first in his own handwriting and later orally, and a comparison of the two showed them to be in many respects irreconcilable. The question is: why was Fisher more believable the second time? The documentary evidence constituted a threat to the defendants, as potentially explosive as Mr. Nixon's tape recordings would have been had the former American President come to trial. If the documents were not to constitute a "smoking gun" they must be forcefully refuted by the protagonists themselves. Since the Tory-Fisher meetings took place in camera,[16] the Court had only the word of the witnesses as to the veracity of their testimony, but that proved to be enough.

The seized documents were important for several reasons. First, they revealed that secret meetings took place between putative competitors, in which intra-corporate information was exchanged in "freewheeling" discussions affecting half of Canadian newspaper circulation. Secondly, the memoranda show the remarkably relaxed and familiar relations between the two largest newspaper chains, in which each side felt free to offer advice concerning the other's properties. Thirdly, attempts by corporate officers to destroy their own records suggests they fully recognized the evidentiary significance of their content.

The two chief defence witnesses were compelled to deny the accuracy of manifest impressions of their meetings as recorded by one of them, and to insist that the aggregation of mutually advantageous transactions which resulted from their consultations were scrupulously independent of one another. Talk of "packages", "rationalization" of markets, "deals" and "sweeteners" had to be rendered innocuous by the sworn testimony of the two men.

The documents indicate that the protagonists "read" one another well; Tory approached Fisher just five weeks after Thomson acquired FP, but Fisher had expected overtures. Indeed, a thread of precognition permeates the entire events of 1977 to 1980.

The picture presented by the Crown's documentary evidence is one of astute and cynical businessmen who distrusted one another, engaged in rigorous negotiations, with newspapers as "bargaining chips". On the witness stand, however, astuteness is replaced with naivety bordering on childish innocence. It "never occurred" to Tory to consult FP's records of negotiations with Fisher in 1978 and 1979 (Globe and Mail, November 3, 1983:11). Such ingenuousness strains credulity and is remarkable in one who, at the time, graced the boards of 18 corporations (Globe and Mail, December 10, 1983b:5).

Nevertheless, despite the weight of circumstantial evidence, defence counsel's confidence in their witnesses is understandable. As members of Canada's corporate elite, "both the picture of the staid and prudent Canadian businessman ..." (Globe and Mail, December 10, 1983b:5), upper-class "gentlemen" with no blemish of a criminal record, Tory and Fisher presented as highly credible witnesses even before they testified. Self-assurance, an utter lack of inhibition in Court, even a disdainful air towards the whole proceedings, only reinforced the impression of unimpeachable integrity. If a criminal trial is in some aspect a "morality play" (Erikson, 1966: 101) and includes a dramaturgical element, the "actor's" ability to "perform" well may count as much toward the final outcome as truthfulness. In such circumstances, education, upper-class socialization, personal wealth and a record of accomplishments in the highly regarded world of corporate business can only be advantageous; by some indefinable process of reasoning such socio-economic attributes are popularly associated with integrity and trustworthiness. Throughout the trial the defence maintained the Crown's case was demolished simply by virtue of the fact that their assertions were denied by Tory and Fisher under oath. Sharing the same social status as the judge and, hence, enjoying a high degree of "cultural homogeneity" with him (Sutherland, 1961:47) the defendants were not unreasonable in their expectations that the judge would attach great weight to the word of gentlemen, and would thus "understand" the confluence of circumstances culminating in "Black Wednesday", as of course he did.[17]

The Crown did not help matters with the inclusion of some dubious charges. Counsel overreached itself in attempting to include Thomson Newspapers in charges pertaining to the closure of the "Montreal Star" in 1979, and counsel's retreat on this point on the opening day may have undermined the overall validity of the prosecution case. The Crown also took a risk charging FP with a conspiratorial role, as a subsidiary of Thomson in the events.

More to the point, it is inexplicable that the Crown at no time suggested that Tory and Fisher might have lied under oath, all the more so since the defence case rested heavily on their testimony. With their corporate backs to the wall and their personal reputations on the line, the Crown was justified in arguing that the witnesses had every incentive to "bend the truth". Yet neither in his cross-examination, nor in his summing up did counsel suggest the court had heard deliberate untruths, despite some weaknesses in that testimony, particularly when Tory and Fisher were compelled to refute the minutes of board meetings and notes concerning their private meetings. The defence understandably elaborated this inconsistency. If the witnesses "thought" they had remained within the law, as the Crown lamely asserted, then criminal intent was lacking and the Crown's case void.

In electing to "pull its punches" the Crown vitiated the aggregate effect of its documentary evidence; this evidence conceivably constituted a "window on the truth", yet Crown counsel displayed hesitancy regarding the panorama of corporate intrigue it revealed.

In the end the Court found Tory and Fisher's explanations "reasonable". More than just the Act constituted a problem in these proceedings; complementing the unhelpful legislation was a perceptual problem, a socio-psychological inability to accept members of the economic elite or the corporations they represented in the role of criminal. The judgement was wholly sympathetic to the corporate perspective, adopting entirely the mind-set of the "sensible businessman" who does not tolerate "losers"; and if the "losers" were all abandoned on the same day it was a matter of entrepreneurical logic not conspiracy, even if the consequences should be reciprocal monopolies. Immediate impressions notwithstanding, all decisions were scrupulously independent of one another with only the timing agreed to by the parties, and that merely a reflection of common sense not mutual distrust.

Even more incomprehensible is Mr. Justice Anderson's conclusion that Tory and Fisher acted in an "entirely open fashion", fully apprising regulators of what was going on. This view is premised on formal communications with the Bureau of Competition Policy and a legal document drawn up after the parties "surfaced" from five months of secret discussions. The question to be settled by the Court was whether the legal ratification of the wholesale exchange of corporate assets was a "smokescreen" concealing a conspiracy to eliminate competition in four cities, and Tory and Fisher's testimony therefore perjurious, or whether both accurately reflected events in the months preceding August 27, 1980. In reducing the case to this dichotomy the Court relegated the intra-corporate memoranda to the status of epiphenomena and insisted that all potentially troublesome references to "packages", "traders", "sweeteners" and so on, could just as reasonably be given an innocent interpretation. That being so the destruction of the documents (if not the occasion) could also be perceived in a "perfectly innocent way". In short, as the defendants had hoped, the Court fully "understood". In the end it all came down to the honourable word of gentlemen given under oath, and, in accepting it, the cumulative weight of circumstantial evidence could be set aside.[18]

If there was a tacit presumption from the outset in the mind of the presiding judge that the distinguished witnesses made unlikely perjurers, the Crown's failure to question their veracity served only to reinforce that view. It seems unlikely, however, that such assertions would have dislodged Mr. Justice Anderson from his line of reasoning.

Conclusion

The government's inability to obtain a conviction was further confirmation, if any were still needed, of the ineffectual nature of section 33 and its inappropriateness for matters involving the newspaper industry. In this regard, as the Royal Commission on Newspapers pointed out, the mistake was to permit such levels of concentrated ownership in the first place. The events of "Black Wednesday" had made apparent a need for special legislation, and was taken up by the Royal Commission in its recommendation that a Canada Newspaper Act be legislated. The government's initiative in this produced an orchestrated sanctimonious protest from editorial columns, driven to "paroxysms of fury" (Goldenberg, 1984:152) by the Commission's report. Once again it was the government which capitulated in the face of corporate pressure and the proposed act was abandoned (Globe and Mail, November 16, 1984:A9), guaranteeing that the "free press" would be free only of state regulation, and otherwise "in chains".

THE ADMINISTRATIVELY ADJUDICATED CASES

Introduction

Four cases which were handled entirely by out-of-court methods must now be examined. The only penalty imposed in each case was a prohibition order. For information on these matters the research was dependent on the laconic accounts contained in the Director's annual reports, which detail decisions taken but not the deliberations behind them.

Orders of prohibition were introduced in the amendments of 1952, and were first used in a merger and monopoly case in response to ERCO's guilty plea in 1970. The manifest purpose of prohibition orders, as articulated by the Crown in the Safeway case, was "to provide ... a more effective remedy or deterrent than a monetary penalty" and "to avoid the necessity of prosecution in every case" (14 C.C.C. (2d.) 17). In examining the facts of these cases the question immediately arises as to why the Crown was so anxious to avoid a criminal prosecution, for in each case the facts seem to warrant a criminal prosecution.

Although the Supreme Court has made it clear that the prohibition order is a criminal procedure, the strategy has the same appearance and socio-psychological consequences for offenders and the public as the injunction and civil proceedings which emanated from the early administration of the Sherman Act in the United States, and which Sutherland (1983:54) called "a clever invention", whose consequence has been to obscure the criminal nature of the offence. In Canada the prohibition order, when used alone, performs the same service for publicity-shy corporate criminals and allows them to declare, as in the Safeway case, that no admission of guilt is conceded and no implication of criminal blame resides in the consent of the accused to the order. At the same time the state is spared the expense and uncertainty of a prolonged prosecution of a criminal statute with a dubious pedigree.

The truncated accounts found in the annual reports offer an opportunity for concealment of indecision, procrastination and political interference, and reflect such pragmatic considerations as budgetary constraints. The annual reports contain accounts by the regulators themselves of how they have performed; the reports are the Bureau's public (relations) face and what is said therein may to some extent be exculpatory and self-justificatory. Reticence concerning the background circumstances of decisions will likely give rise to suspicion in the minds of persons familiar with the "politics" of regulation.

The more abbreviated an account is, the greater is the danger of distortion of the circumstances which gave rise to the adjudication. When we read in the Montreal diaper service case that: "It was decided that an Order of Prohibition be sought ..." (Annual Report, Director of Investigation and Research, 1970-1971:48), it is reasonable to ask why this was considered the most appropriate method of proceeding when three firms were alleged to have been in control of the market for years, and, from the specific proscriptions in the Order, had practiced exclusionary habits in order to perpetuate their control.[19] The out-of-court cases will now be considered individually.

Wee Folks Diaper Service et al.

A file was opened in 1965 but the case received a first and only mention in the 1970-1971 Annual Report, where the impression was given (p. 48) that the matter came to the attention of the Bureau in the period 1968-1969. Evidence of "foot-dragging" abounds. Despite clear indication of oligopoly, a search of the business premises of the three parties concerned (the first proactive sign of intent to pursue a case to a conclusion) did not take place until September, 1969, some 41 months after a file was opened.[20] After the evidence was sent to the Attorney General (who alone can order a prosecution) another 14 months elapsed before the political authority allowed an information to be laid. Four months after that, an Order was preferred unaccompanied by any other penalty, and this posture was adopted ostensibly because of the delay in prosecuting! It might reasonably be questioned whether at any time there was a serious intention to lay criminal charges. What was the thinking behind the spasmodic handling of this case? One will look in vain in the Annual Report of 1970-1971, wherein the Director's account of the events leading up to the Order occupies less than 14 lines of text. This represents a skeletal chronicle of overt acts without any indication of the policy options, if any, and how they weighed in the minds of decision makers. The Order prohibits the continuance of specific anti-competitive practices and forbids the acquisition of any competitor, without directly reducing the market dominance already arrived at by such methods.

Anthes Imperial

In this case also the facts uncovered appear to justify a vigorous prosecution. The Director alleged a monopoly covering most of four provinces for the years 1952 to 1965, and a report by the Restrictive Trade Practices Commission found "substantial or complete control" and strong evidence of abuse of market position, such as attempts to obstruct competitors and predatory pricing. The requirements of the Act for a prosecution appear to have been met, with a good prospect of conviction.

The case shows officialdom's tolerance for monopoly; it was not the monopoly itself that was objectionable but its abuse. Nor did Associated Foundry's monopoly in British Columbia present a problem. This firm constituted only "potential" competition for Anthes Imperial, and vice-versa, thanks to an "opting out" arrangement whereby each agreed to abstain from competition with the other. As has been seen in several of the court cases this arrangement was unlikely to cause legal problems, and difficulties only arose when Anthes purchased an interest in Associated. Despite what appeared to be a good case against Anthes the Crown "refused" to prosecute (Gorecki and Stanbury, 1979:166), and instead settled for an Order of Prohibition. The reasons why are not to be found in the Director's account of the matter. Instead, his office took about six years to adjure the company from further anti-competitive behaviour and to take steps to facilitate some improvement of prospects for future competition.

Safeway

The issue of Safeway's ubiquitous presence in the food retail markets of Alberta's two largest cities presents the most glaring instance of diffidence and evasion of responsibility by combines regulators. Despite bodings of public discontent reaching back to at least 1959 Director Henry adopted the role of corporate apologist, and in 1963 publicly voiced his lack of concern on the basis of an inadequate and incomplete study. A Parliamentary committee corrected this impression in revealing that five supermarket chains controlled 75 per cent of the Canadian market. Their call for a sustained scrutiny of the situation was rejected by the Director, on the grounds that an intense investigation of this one sector of the economy was beyond the resources at his disposal. In conceding this the Director unwittingly revealed the legitimizing nature of the role he was mandated to perform. His discomfiture was increased when a more serious situation in western Canada received the attention of a provincial royal commission, which heavily criticized the federal regulatory performance. The commission found high profits, excess capacity and higher levels of ownership concentration than in any other region of Canada, but the Director responded that an investigation by his office was not forthcoming since the evidence, in his view, did not justify an inquiry (Mitchell, 1975:179). This statement merely emphasized the cogency of the royal commission's view that new legislation was called for. In all of this, legislators appeared to be more effective "watchdogs" than the Director and his staff.

By the mid-1960's the Bureau of Competition Policy was attentive to the problem and the case stumbled along intermittently until, after seven years, the Crown admitted in open court that it had no eagerness to contend facts that promised to be complex, time consuming and, given the capricious nature of the legislation, uncertain in outcome. All things considered, the Crown would rather settle for an Order of Prohibition.

The agreement which produced a volte-face on the part of the Crown on the opening day of the preliminary hearing, was presumably the product of intense negotiations between opposing counsel, with the consent of their clients, over a lengthy period of time, but no details are available. The Director's annual reports for the period 1966-1967 to 1971-1972 are silent on the subject.

The absence of even a nominal fine is troubling, considering the duration of and degree of market control manifested by Safeway, and evidence of barriers to entry and restraints on competitors' retail space exercised by the supermarket chain. The company exhibited a distinct lack of concern for the attention being given it by regulators, adding 11 more Edmonton stores between 1965 and 1974 and almost doubling its presence in Calgary. A fine would have required some admission of criminal wrongdoing by Safeway, but the company, in the circumstances, was not obliged to make that concession; the agreement has all the appearances of Safeway having driven a hard bargain. The company was evidently prepared to take its chances in court if it had to, while the state was less than committed to prosecuting the case. Consequently, one of the more tireless acquisitors in corporate business emerged from this imbroglio without the inconvenience of a criminal conviction.

The Order of Prohibition was detailed in its proscriptions but, as has been noted, it contained less substance of a punitive nature than met the undiscerning eye. The company's long-term program of encroachment remains unaffected. It is difficult to equate this Order of Prohibition with the "interests of justice and prudence", or to see it as "a more effective remedy or deterrent than a monetary penalty" (14 C.C.C. (2d.) 19, 17). The "surrounding circumstances" (p. 19) which a judge is asked to weigh, in exercising his discretion to proceed by way of a prohibition order, are seldom available for public scrutiny. We know only that the case was protracted over an unconscionable period of time (during which the party concerned continued to materially benefit from its anti-competitive practices), at the end of which the Crown declined to proceed with the adversarial process. The desire "to avoid the necessity of prosecution in every case" (p. 17) would be understandable if section 33 enforcements were frequent; the reality is quite the reverse, and why the state should have avoided prosecuting this case so assiduously is far from clear.[21]

Pacific Northwest Bus Company

This entire matter is dealt with in just nine lines of text in the 1985-1986 Annual Report. An information was laid only after the terms of the Order had been agreed, by which time the case had been known to the Bureau for three years, although there is no record of what transpired in this period. The Order allows the Director to monitor the company fairly closely, on the basis of conditions designed to foster competition in the long term.

PUNITIVENESS OF THE ACT

Each case has been examined on its merits on the basis of: (1) trial proceedings and verdict, (2) administrative adjudication and decision. The study shows that the majority of merger and monopoly cases pursued to a conclusion in the period 1945 to 1986 were channeled through the criminal courts, and that when all 12 cases are examined as to outcome six are seen to be "victories" for regulators and six "defeats". However, when the victories are examined in terms of the penalties exacted it is apparent that the defeats are more significant than the putative successes (Gorecki and Stanbury, 1979:165-166).

In the six cases in which a decision of culpability was obtained the Eddy Match conviction produced only fines while the monopoly remained in place, ERCO was fined and made subject to a prohibition order and the remaining four were out-of-court cases which yielded only orders of prohibition. In none of these matters (nor, for that matter in the six cases acquitted at trial) were officers of the companies charged.

When the history of enforcement of all sections of the Act is examined, it is seen that fines and prohibition orders have been imposed virtually to the exclusion of other sentencing options (Stanbury, 1976:592). A glance at the enforcement record, when convictions were registered and fines levied, suggests that in matters of competition law "crime pays" (p. 571). Generally, the philosophy of the courts has been that "penalties should be substantial and exemplary but not vindictive ..." (p. 580), but action has fallen short of professed intentions.

Fines

Maximum fines, in those years in which maximum levels were stipulated,[22] have rarely been imposed (pp. 579-580), even though on several occasions specific judges have complained that upper limits have been too low (pp. 580-582). The largest fine imposed for any offence under the Act, on a single offender and for a single count, up to the mid-1970's, was $125,000 (p. 572). This was on a conspiracy conviction, when no maximum fine was fixed by law (Gorecki and Stanbury, 1979:168). Fines in most cases have borne little relation to the size of the corporate offender, the duration of the offence, or even a conservative estimate of the illicit profit earned by the crime.[23]

> "In Canada, the cutting edge of the law as it relates to restraints of trade has been dull. Any rational,

> calculating businessman would not be deterred by the size of the fines (and legal costs) given the benefits of fixing prices, engaging in resale price maintenance or merging with competitors, and the low probability of being convicted" (Stanbury, 1976:573).

One remedy is to make all fines a proportion of profits or sales for the period of the offence (p. 617), as a means of raising the penalty "to the point where it becomes unprofitable to break the law" (p. 616). The absence of class action and treble-damage civil law suits in the Combines Investigation Act (and the new Competition Act) are glaring deficiencies which should be rectified. Another important departure from present stratagems would be the imposition of fines on both corporations and senior management responsible for decisions to violate the Act. The difficulties of locating the guilty persons (Stone, 1978: 331) are counter-balanced by the fact that corporate officers "belong to a social group that is exquisitely sensitive to status deprivation and censure" (Geis, 1973: 183). A prerequisite for effectiveness is to ensure corporations do not indemnify employees (Clinard and Yeager, 1980:318; Yoder, 1978:49).

Without such innovative thinking in sentencing policy there is only the dismal prospect of a replication of past ineffectualness, in which fines:

> "... have not deterred, ... have not punished and ... have not provided a remedy - particularly to those directly affected by the illegal restraints of trade" (Stanbury, 1976:607).[24]

Prohibition Orders

Since 1970 prohibition orders have come into vogue for section 33 offences. For other offences they have often been used in conjunction with fines (p. 577). Although orders of prohibition vary in their restrictive content (which, as has been indicated, is not itself a measure of their effectiveness)[25] they are remedial and prospective in tone, and do nothing about destructuring monopolies or compensating for harms already done. This reflects the compromise nature of the regulatory strategy; while prohibiting continuance of past offences they have not allowed for restitution[26] or forfeiture of illicit profit and, in "resolving" merger and monopoly offences, prohibition orders have usually constituted the only penalty. The circumstances in which an offence is likely to be dealt with by an order of prohibition, unaccompanied by any other penalty, are given by Stanbury (1976:577).

> "Where the documentary evidence is not as complete, where the evidence is stale due to delays in direction or investigation and prosecution or where the defendant's lawyer has been successful in his pre-trial representations to the Director or the Department of Justice, the Crown has settled for a prohibition order only".

The effectiveness of prohibition orders depends very much on what kind of follow-up, if any, is instituted by regulators (p. 578), but monitoring most often lapses with the life of the prohibition order.

Alternative Penalties[27]

The almost total reliance on fines and prohibition orders obscures the fact that other sanctions have been at the disposal of Canada's combines regulators, in some instances for decades, but have been rarely or never used. Since 1910 the Combines Investigation Act has provided for the reduction of tariffs, but the option has not been used[28] despite almost a dozen recommendations by the Director and the Restrictive Trade Practices Commission at various times (p. 576).

The federal government has also had, since 1910, the power to void or amend patents or trademarks or the terms of licences, a prerogative that has been used sparingly (p. 577). More to the point, the courts since 1952 have been authorized to dissolve mergers and monopolies but this has never been used. The power to dissolve arrived too late to break up the Eddy Match agglomeration of pseudo-competitors, but could have been used in settlement of the ERCO case and might have proved publicly beneficial in loosening Safeway's grip on the food retail market. Cases such as these cry out for a structural solution, on the principle that market structure determines how firms and whole economic sectors behave. In the face of a structural fait accompli such as Safeway manifested in the 1970's, fines and prohibition orders are as effective as eggs thrown at a wall.

> "Telling oligopolists not to recognize and to act on their interdependence is asking them to fail to behave in a rational, self-interested fashion. Practically, it is impossible for firms in a concentrated industry to ignore each other and to behave independently. If concentration is high enough they need not formally collude to effect agreement upon variables such as price, output, and perhaps even quality. Subject to the constraint of technical

> efficiency (economies of scale), the only really meaningful remedy is to break up the constituent firms, creating more, less interdependent, competing entities" (pp. 578-579).

Stanbury (1976:579) sees the strategy as an improbability given the pragmatic problems of unscrambling merged assets, and "because the Canadian judiciary is so conservative and trusting of large aggregations of economic power ...". The relative smallness of the Canadian economy also offers the opportunity for arguments concerning the inevitability of oligopolistic market control and the exigencies of international competition, as was seen in the ERCO discussion (McFetridge, 1974:1-2, 8-9).

Finally, there is the penalty of incarceration for high-echelon corporate officers, without whose authorization illegalities could not occur. Prison terms of up to two years have been provided since the first Criminal Code insertion, but very few businessmen have been jailed for the simple reason that few have ever been charged, and the Crown until recently did not request confinement (Stanbury, 1976:611). In 1974 the sentence was imposed for the first time, on a small businessman for a second misleading advertising offence; he received a sentence of two years (Snider, 1980:360), later reduced to one year (Stanbury, 1976:571). In the next two years three more individuals were jailed for misleading advertising, all for one day each (p. 571).

The rationale underlying the policy of charging businessmen is ideally suited to ensuring members of the corporate elite are not troubled by the prospect of a criminal charge.

> "... as a matter of policy the Crown has not laid charges under the Criminal Code or Combines Investigation Act against an individual except when that person was carrying on business in his own name" (p. 609).

The only scenario by which senior management of large corporations might be charged would be if a "smoking gun", in the form of compelling documentary evidence attributable to them, were available to the Crown, something that rarely happens in instances of corporate wrongdoing.

> "... when the evidence is sufficiently overwhelming (e.g., minutes of meetings at which prices have been fixed and markets carved-up) Canadian judges have convicted the defendants. However, they often do so most reluctantly, pointing out the "technical" nature of the offence and the fact that the executives involved are clearly upstanding and respected members of the community who have unwittingly gone astray" (p. 608).

In the 1970's the Bureau of Competition Policy indicated a willingness to charge individuals "where the evidence is sufficient and may suggest the imposition of prison sentences were appropriate" (p. 612).[29]

Stanbury (1976:612-613) offers arguments for a policy of incarceration. Corporations are legal entities who owe everything they "do" to human agency. Without a policy by which those agents are held responsible, the truly culpable will escape the consequences of their crimes. A prerequisite for this innovation is the restoration of intent as a material consideration in merger and monopoly prosecutions.

> "The corporate veil must be torn away and recognition given to the fact that men, not legal entities, fix prices, divide markets, negotiate mergers and

> administer resale price maintenance schemes. The time has come to stop the denial of individual human responsibility" (p. 611).

Charging individuals increases the personal cost of corporate crime. As things are, the individual's reputation is not at risk since he is able to hide behind a "corporate alibi". Failure to prosecute individuals "engenders disrespect for the whole system of criminal justice" (p. 613), particularly as the offence is a singularly premeditated one (Braithwaite and Geis, 1982:301-302). Stanbury (1976: 607) believes "the most significant barrier to the reform of the penalties and remedies in respect of illegal restraints of trade" is "the public perception of white collar crime in general".[30]

Judicial and Extra-Judicial Strategies

From the preceding analysis and discussion it is apparent that matters prosecuted in court cannot be readily distinguished from those settled by a prohibition order in terms of the case facts. It is not easy to explain why at least some of the four out-of-court cases were not prosecuted, particularly that of Safeway. In the absence of "hard" information concerning the regulatory strategy in each case one must resort to speculation. A reading of the terms of the orders of prohibition allows one to surmize that convictions might have been obtained on some charges.

In light of the foregoing analysis it is clear that the delays in adjudicating the four cases and their ultimate "resolution" by prohibition orders was the legacy of the

1960 decisions concerning the beer and sugar refining industries. From that point on the presence of any competition, even when inactive, was likely to be enough to preclude a conviction. The range of cases which could be prosecuted with some reasonable expectation of a conviction had been delimited by the 1960 decisions to those in which a virtual monopoly existed. Nevertheless, the Crown elected not to appeal those watershed decisions for fear that section 33 would be entirely eviscerated by the higher courts. Combines regulators and the Department of Justice preferred to sustain an ambiguous law while refraining from any further testing in the courts. Had the appeal process been followed through, the ineffectualness of the merger and monopoly provisions of the Act and the need for new legislation would have been apparent years earlier.

As a "middle way" approach to recovering the loss of legitimacy implicit in the rulings, the Program of Compliance and, more especially, the prohibition order were instituted in place of litigation. The enfeeblement of section 33 meant that even a case as promising, from an enforcement standpoint, as that of ERCO had to be plea bargained to ensure a badly needed "victory" could be recorded for posterity. Three more prohibition orders were issued in connection with section 33 offences in the next three years (1971-1973). Yet all had come to the attention of the Director in the mid-1960's, and it remains unclear why the cases were prolonged so unduly.

In the matter of Anthes Imperial it was the 20 per cent share purchase of Associated Foundry that principally drew regulatory interest. Anthes' divestment of this interest pacified the Director and paved the way for an administrative settlement. In the remaining cases it is difficult to justify the policy of circumventing the courts other than in terms of budgetary considerations, and the regulators' awareness that the legislation was no longer an effective means of meeting threats to competition. The Crown made no secret of its unwillingness to enforce the Act by means of a prosecution in the Safeway case, and it may be that the matter would not have been taken up at all had it not been for political pressures from Parliament and provincial legislatures. Having been "pushed" into recognizing the problem the regulators blanched at the prospect of an adversarial contest of possibly two years duration, and agreed to waive all charges by agreeing to a prohibitive declaration that, 14 years later, has not bequeathed to the public the competitive advantages the Crown forecast in 1973. The "settlement" was chiefly advantageous to the accused.

The cases of the Montreal diaper services and the Pacific Northwest Bus Company involved clear evidence of abuse of a dominant market position. The presence of some competition, however marginal, and the demarcated nature of the market may have precluded the financial expenditure and effort of a prosecution, while in the latter instance section 33 was for all purposes in permanent abeyance following the Thomson-Southam newspaper decision of 1983.

Anticipating an entirely new statute the Bureau had little choice but to seek a prohibition order.

THE STATE AND LAW: A THEORETICAL ASSESSMENT

In the light of the preceding findings the empirical "fit" of theories of the state and law, discussed in chapter two, can now be assessed. Several possibilities present themselves. The data may provide empirical support primarily for the liberal conception of the advanced capitalist state and law or to either the instrumental or structural varieties of the Marxian model. Alternatively, all three models of reasoning may be found to be inadequate in explaining the particular pattern of combines law enforcement, yet may contribute proportionately to the interpretation of the data. In any event the purpose of theoretical evaluation is not to fit the data to the theory but to assess the adequacy of what are general propositional statements as explanatory frameworks for a particular pattern of regulatory enforcement.

In terms of logical expectations the liberal-pluralist model of the state and law would predict a high level of combines law enforcement. A literal rendition of instrumental-Marxian reasoning hypothesises no enforcement at all and perhaps no legislation either, while the structural-Marxian approach asserts that the relatively autonomous state is capable of only a degree of intervention, somewhere between that promised by the liberal-pluralist and instrumental-Marxian models.

The Liberal Conception of the State and Law

In order to employ the liberal perspective one must deduce from the case material presented that Canada is a sovereign nation and a pluralist society, ensconced in a "free market" competitive economy. A pluralistic social structure implies an absence of concentration of power, a centrifugal diffuseness in which no specific agglomeration of interests is seen to take priority over all others. Instead a plethora of particular groups "balance" one another and conflict, largely institutionalized within the state apparatus, does not coagulate around economic issues in such a way that one can speak of "class conflict".

In place of this a myriad of minority interests compete with one another for the attention and beneficience of the state, mediating in the name of a "national interest" which the state alone is competent to discern. No specific interest or alliance of interests can be expected to win preferential access to state power and favours, and all other interests serve to restrict state access and counterbalance ex parte overtures. In mediating, the political elite who administer the state maintain a political "distance" and distinct identity from all claimants upon the state's resources. In any prolonged confrontation between the state and economic interests, it is the political elite who retain supremacy and private interests which must capitulate "in the national interest" and in a spirit of overall consensus.

This is hardly the picture of the Canadian state which emerges from the legislative history of competition law as outlined in chapter five or from the enforcement of section 33 of the Combines Investigation Act in the post-Second World War period. From this it is difficult to sustain a pluralistic image of the Canadian political process or the independence of law making from the economic structure, given the evident participatory role of the big business lobbies in the shaping of all combines legislation since 1889. Canada has a history of corporate intervention in the political sphere whenever business interests are seen to be at issue, in matters ranging from combines law and amendments thereof to free trade.

In order to sustain the claim of autonomy which Marx says is vital for law to succeed as ideology, the state-corporate negotiations which have characterized combines law making must be cloaked in a guise of pluralism, at least in public. The most recent bout of drafting which produced the 1986 Competition Act lacked even the appearance of pluralism as private bargaining between elites was protracted for years, and references to such incestuous dealings were openly referred to in the House of Commons at the time of passage.

At such times the "decomposition of capital" is not much in evidence and the corporate elite is able to unify its erstwhile disparate and conflicting concerns and embody them in such representative organisms as the Canadian Chamber of Commerce, the Canadian Manufacturers Association and the Business Council on National Issues. The ability to unify when circumstances dictate they should is facilitated by the high degree of concentration of corporate ownership which has been attained in a century of "anti-combines" law. The success of the economic elite in shaping that law is attributable to their privileged and low-visibility access to federal and provincial cabinets and senior bureaucrats and to the sensitivity to corporate concerns found therein, all of which refutes the liberal tenet of approximately equal access for group interests. The reality is that state and economic elites confer by means of a structure of representation that grants differential access according to socio-economic status. Instances of state responsiveness to corporate unhappiness in recent years is seen in the withdrawal of the 1971 legislative proposals to scrap the Combines Investigation Act and replace it with more restrictive legislation, the removal of the combines Director Robert Bertrand in 1981 after his oil inquiry had angered the industry majors and the quashing of the proposed Canada Newspaper Act in 1983. In each confrontation it was the state which made concessions to placate the economic elite.

The history of the Canadian state's relations with big business does not support the liberal precept of the supremacy of the political elite over those of the economic sector. Nor can political and economic elites be said to perform discrete roles in the process of economic management. A high density of personnel "traffic" has been discerned but not one that can be said, in instrumental terms, to constitute a direct translation of corporate elite priorities into state policy. The economic elite's relations with the Canadian state has an instrumental quality to it but one rooted in historical and structural conditions embodying a state-business symbiosis, a pervasive state presence in economic development unambiguously supportive of capital, an emphasis on rapid capital accumulation by the most efficient means and a conservative political culture which stifled any incipient socialist tradition in its early stages.

Canadian economic history is one of uninterrupted and massive state entrepreneurship and it is this interventionary role in support of capital that highlights the contradiction between the ideological claims of legal and political equality at the level of citizenship and the obvious socio-economic disparities at the empirical level. In place of the "sovereignty of the market" there are shared monopolies and a multitude of direct controls.

Such a policy does not allow for the independence of political from economic elites but an entente cordiale in which business is the dominant partner. Regulation was much to the liking of the emerging corporate elite, especially when the alternative was considered. A form of state capitalism circumventing a laissez-faire period was therefore to be expected, in which the legitimation function would be an afterthought as exemplified by the late arrival of the welfare state, only fully in place in the early 1970's (Banting, 1987:311). Combines law was an earlier legitimation gesture whose value was undermined once it became apparent that the law was disproportionately applied to small business and ineffectual when brought into play against large corporate players. In the lifetime of the legislation there has never been a successful prosecution of a contested merger case and no monopoly has ever been disturbed by the courts. This contrasts with the record of United States regulators who can point to the breakup of trusts[31] in the "Progressive Era" in such sectors as tobacco, beef, fertilizer and the greatest monopoly of all, the Standard Oil Trust, dismantled in 1911, and who have subsequently sustained a superior regulatory performance quantitatively and qualitatively[32] (Gorecki and Stanbury, 1979:159-160). During the Progressive Era (roughly the first 20 years of this century) the Canadian non-interventionary state presided over a period of intense merger activity.

The liberal model of the advanced capitalist state predicts a high level of regulatory activity by a "neutral" state mediating between corporate and other economic interests. The data reported here do not sustain this pluralistic picture but, on the contrary, reveal a basically non-interventionary state tolerant of virtually all mergers in the period, highly selective in its choice of regulatory subjects and concerned for the most part to avoid confrontation with big capital.[33]

In a period of 40 years only eight criminal prosecutions took place and four others were handled by extra-judicial procedures. Of the eight criminal cases only two produced a guilty verdict and one of these resulted from a plea-bargained reduction of charges. No monopolies were broken up and in no instance did a corporate offender suffer long-term punitive consequences.

Marxian Models of the State and Law

The history of Canadian state development and, in particular, the account of combines legislation and enforcement presented here, offers little in support of the liberal conception of the capitalist state. For a more useful model one must have recourse to a Marxian variant. The value of a Marxian perspective is that it allows for specific historical and national differences in place of a liberal tendency to generalize, gives a central place to class conflict and allows for historical forms of class rule. This allows the analyst to dispense with such platitudes as "national sovereignty" and take cognizance of such special Canadian features as her satellite status, economic dependence and incremental continentalism in relation to the United States.

The conspicuous state presence in the economy is more easily accounted for by a Marxian framework which theorizes capitalist development from primitive accumulation to welfare state capitalism; the absence of a laissez-faire period, problematic in a liberal model, can also be accommodated. Providing deterministic reasoning is avoided, the Marxian perspective is a superior analytical tool in comprehending the complexity of specific advanced capitalist states. While allowing that classes compete for state power and that subordinate classes and social groups play some part in state policy formation the prioritization of dominant class interests in policy is explained by differential access according to specific class interests and fractions thereof.

Combines law singularly lends itself to a Marxian analysis. Few laws more directly "have their roots in the material conditions of life ..." (Tucker, 1978:4). The rapid concentration of ownership of capital clearly required a legal articulation. Combines law is expressive of the ideology of competitive free enterprise as the "fairest", most logical, balanced and equitable means of creating and distributing wealth. In the era of welfare state capitalism the philosophy of free enterprise would be unable to withstand the empirical evidence of an economy which is less competitive every year without the backing of what purports to be clearly enunciated law. It is this legal demarcation which sets the ground for the conflict of economic interests; but in Canada it has been a ground meticulously prepared by the corporate elite with the collusion of the state. The result has been a statute potent in symbolism but instrumentally weak.

The Instrumental-Marxian Conception of the State and Law

In this perception the bourgeoisie's control of the state apparatus is accounted for in terms of the strategic placement of dominant class members in key state positions, interacting with fellow members of the economic elite for the advancement of corporate interests. In Canada instances of elite "crossover" have been documented (Clement, 1975: 346; 1977:238-240) and there is ample evidence of the economic elite's participation in combines law making. In any case, state and corporate elites have historically enjoyed close relations, a circumstance only partly explained by the presence of economic elite personnel in the state apparatus.

A feature of this intimacy has been the ability of the corporate elite to consult with regulators before acting on mergers, one reason why there have been so few prosecutions under the Combines Investigation Act. That this circumstance is to the mutual benefit of state and corporate personnel is borne out by the fact that the process of consultation and negotiation has been institutionalized since 1960 in the Program of Compliance. Access of this kind to the thinking of state officials gives economic elites a fairly accurate idea of what can be accomplished without regulatory intervention and minimizes the embarrassment of a criminal prosecution. The decision to go ahead with a merger may therefore be a calculated risk which some businessmen, (such as K.C. Irving and the owners of the Southam and Thomson newspaper chains) but not others, are willing to undertake.

The role of the Canadian judiciary also lends itself to instrumentalist reasoning. While the compilation of combines legislation has historically been a joint undertaking of the executive, bureaucratic and legislative branches of the state with input from the corporate elite, the data presented here illustrate the pivotal role of the judiciary whose task it has been to interpret the legal language. It has been this reading that has largely accounted for the inability of regulators to successfully implement the law in the courts. The judiciary of the higher courts, a relative handful of persons drawn from the upper regions of the Canadian social hierarchy (Olsen, 1980:44), in the course of legal practice often become familiar with the business viewpoint and as senior judges deal mainly with matters of concern to the corporate and social elite (pp. 51, 52, 55). This creates the possibility of intra-state conflict in which branches of the state apparatus work at cross-purposes; in this instance the executive branch authorizes regulators in specific instances to enforce the Act while the courts' restrictive interpretation of the law renders it unenforceable. During the four decades reviewed here the courts proved to be an important second line of defence of corporate interests by a succession of such precedent setting rulings.

The act of acquittal in a case involving a major corporation does not in itself entail a weakening of legitimation for credit accrues to the state and the law in laying criminal charges in the first place, and for making the Act criminal rather than civil law. However, when a series of prosecution defeats occur over an array of cases, in the adjudication of which the substance of the law is transformed to a point at which the Crown pronounces the law impracticable for prosecutorial purposes, then the law becomes stripped of its legitimacy. The core provisions of combines law were most persuasive as justificatory statements on behalf of Canadian capitalism and its class system as long as it remained undisturbed as "law-in-the-books". Insightful from a Marxian standpoint which declares law to be the most powerful ideological statement in a capitalist class society whose fundamental purpose is to win consensus for inegalitarianism, is that almost as soon as the kernel of combines law was operationalized with some regularity the specious veneer of enforceability was torn away and its latent legitimation function revealed. The essential symbolism of the Act was apparent even in the imposition of penalties, given their inadequacy.

Nevertheless, the record of the higher courts is not one that will unequivocally serve the uses of instrumental Marxism. The Supreme Court of Canada in recent years has gratified corporate interests with its ruling on monopoly in the Irving case in 1976, its 1984 finding that corporations enjoy the same protection from unreasonable search or seizure as individuals under section 8 of the Charter of Rights and Freedoms (Maclean's, October 1, 1984:68), and in its 1987 opinion that unions do not have a fundamental right to bargain collectively or strike (Edmonton Journal, April 10, 1987:A1). But on ethical/moral issues (where, in instrumentalist terms, ruling class interests are not at stake) the Court has demonstrated (in the current political context) a liberal propensity, particularly in its ruling of January 28, 1988 that the abortion law of Canada was unconstitutional. Overall, the instrumental-Marxian model of the state serves poorly in explaining the pattern of enforcement of section 33 of the Combines Investigation Act since 1945, in view of the fact that there was enforcement at all and that in one-half of the cases cited some expression of culpability was directed at the offenders or accused and a penalty or stricture imposed. Instrumentalist thinking may be more useful within a structural model, for example, in explaining why particular corporations were or were not prosecuted and what tactical alternatives were available to regulators and corporate elites within structurally defined limitations.

Elites' control of the state is always limited by structural considerations, principally the state's position in relation to class conflict and the accumulation and legitimation roles. The instrumental role of the Canadian state was a consequence not of "capture" by the emerging bourgeoisie but by the historical circumstance of having been structurally "locked into" the accumulation process as a central player from the beginning.

The Structural-Marxian Conception of the State and Law

From these facts of history a structural-Marxian model of the Canadian state would seem to be the most appropriate mode of analysis. This view contends that state policy is shaped by structural contradictions and constraints. The presence of members of the bourgeoisie in high-echelon state command posts is merely an artifact of structural considerations and not in itself an adequate explanation of policy directives. For the Canadian state the structural constraints in question are found in late capitalist development, economic dependence, high levels of foreign ownership in the manufacturing and natural resource sectors, a limited market and a continentalist approach to future economic development as enshrined in the current government's wish to ratify a signed free trade agreement with the United States.

These constraints serve to check any initiatives to shift government policy sharply to "left" or "right", although minority government status can be expected to be reflected in policy options, as was the case federally from 1962 to 1968 and 1972 to 1974 (albeit without any obvious change in combines enforcement policy) and provincially in Ontario between 1985 and 1987. Finkel (1977:360-361) and Moscovitch and Drover (1987:27-29) have argued that much of the social welfare legislation of the 1940's was a response by the federal government to an increase in popular support for the Cooperative Commonwealth Federation.

The data presented reveal a weaker regulatory pattern than the structural-Marxian model would predict but one in continuity with the prior history of combines enforcement. In Canada between 1945 and 1986 the corporate elite pursued its acquisition policies almost completely unhindered by state regulation. A handful of corporate members suffered the indignity of being cited by regulators and some were even charged with criminal offences. Of those who were, three-quarters had their reputations restored to them by acquittals and the remainder accepted minor financial penalties while retaining the capital expropriated in the first place and which ostensibly was the reason for prosecution. Four other offenders received equally non-punitive "penalties" in extra-judicial proceedings. The appearance of justice being done was therefore ideologically accomplished while the long-term interests of even those cited were not disturbed.

The reason for weak enforcement must be sought in the particularities of Canadian state development which, when examined, suggest the structural-Marxian model is an imperfect explanatory framework, if superior to other models. Two of the most salient conceptual features of the structural schema are represented only weakly in the Canadian instance, those of the centralized state and the relative autonomy of the state from all classes.

In Canada the balance of state power favoured the central government until approximately the beginning of the post-Second World War period, when a shift in federal-provincial government responsibilities occurred, precipitated by the emergence of the provinces as entrepreneurial partners of regional bourgeoisies and facilitated by the transfer of resource ownership to the prairie provinces in 1930. Since then the proportion of state expenditure undertaken by the provinces has grown steadily[34] and the trend to decentralization has been accentuated by the tendency of provincial governments to look to corresponding regions of the United States as sources of trade and investment capital.

Integral to the structural-Marxian conception of the capitalist state is the characteristic of relative autonomy by which the state is able to undertake interventionary initiatives against specific units of capital. In Canada the state has no imperative to intervene in the area of combines regulation given the particular distribution of state resources between the accumulation and legitimation functions and the overwhelming primacy of the accumulation role. Non-intervention, then, is essentially a "non-decision". The record of non-enforcement of the merger and monopoly provisions of the Combines Investigation Act strongly suggest that the state's objective has been to maintain only minimal competitiveness. For this to be attained very few successful regulatory interventions are necessary.

The data show only questionable successes in regulating particular corporations and only defeats when attempts were made to gain a greater measure of control at the industry level. Intervention occurred selectively, not routinely, and was contingent upon blatant abuse of a tolerant law. Even then the wheels of justice ground slowly. In none of the cases that have been examined here can the state be said to have responded with alacrity; for those that went to trial the average time expended from the initial investigation to verdict was approximately six years. Charges were laid: (1) when the offence was highly publicized and too outrageous to ignore, such as the two newspaper cases, (2) when the state was "prodded" by other interested parties as in the Safeway case, (3) when the case seemed strong enough to secure a badly needed conviction for the state, as in the Eddy Match, Canadian Breweries and ERCO cases.

The state's inability to intervene successfully at the level of the economic sector is attributable to the historical alliance of state and economic elites which has made it difficult for the former to adopt a degree of autonomy in its dealings with agglomerations of capital, the domination of foreign capital in specific sectors and the countervailing power of provincial governments as spokesmen for regional bourgeoisies. Another historical fact of Canadian state development which renders the structural-Marxian model of limited usefulness is found in the colonial and neo-colonial status of Canada in its relations with Britain and later the United States. This posture fostered a middleman role on the part of Canada's financial elite and a disregard for the development of an indigenous manufacturing bourgeoisie. In the absence of a laissez-faire period the social structure which emerged was one in which elites quickly formed, hierarchical, authoritarian and without egalitarian pretensions, and fearful of absorption by the more powerful neighbour to the south. In these geo-political circumstances the

Canadian state's priorities were to foster accumulation by all means at its disposal, including foreign and public ownership, by meeting the requirements of economic elites, indigenous and foreign, and presiding over the infusion of foreign capital into the manufacturing and resource sectors.

Accumulation proceeded most efficiently via large capital units, given the limited growth potential of the economy; a program of corporate concentration was central to state policy with only the feeblest of legitimation gestures in the form of combines laws.[35] Not until the processes of corporate concentration and foreign ownership were well advanced would the legitimation function receive serious consideration in the belated arrival of the welfare state.

In such a vortex of historical circumstances a meaningful regulatory policy would have been a functional contradiction. Yet elsewhere on the North American continent capitalism took shape in conjunction with a comparatively activist state in support of capital. It is important for explicatory purposes to briefly examine the American case.

The more vigorous regulatory performance of the United States is grounded in an ideology of free enterprise and individual resourcefulness in contrast to that of Canada where a commitment to competitive capitalism never took root. Endowed with far greater economic and human resources and secure in her sovereignty, the United States arrived at monopoly capitalism only after a laissez-faire period. Having achieved so much largely by private enterprise, a popular mistrust of state intervention prevailed into the era of the trusts. Market dominance was viewed as a reward for initiative and diligence, provided it was accompanied with a sense of social responsibility; it was the absence of corporate conscience that produced the first regulatory legislation in the late 1880's.

In the United States, then, an important factor was the ideological backing enjoyed by the state in acting against corporate capital seen to be in abuse of a dominant market position. (In Canada the same distinction between dominance and abuse of dominance, between "good" and "bad" monopolies would be made, with the difference that in the United States those monopolists perceived as anti-social could anticipate state intervention and the dissolution of market control). The Progressive Era legislation was a response to popular concern about the direction free enterprise had taken, and without such a popular mandate the state could not have intervened successfully against such a power as the Standard Oil Trust. The prosperity of the 1920's would produce a reaction to reformism and the withdrawal of the regulatory state, only to re-enter in an unprecedented fashion under the aegis of the New Deal whose objective was to sustain a minimum level of activity until economic revival took place. In Canada, by contrast, capital was essentially given a free hand to retrench during the depression.

Following the Second World War the United States re-emerged as a regulated oligopolistic economy featuring price leadership, market sharing and long-term corporate planning, but with a "free enterprise" ideology still in place to legitimize the new order. Those economic sectors which tended to "natural" monopolies, such as transportation or utilities, remained in private hands whenever profitable, though subject to regulation. In Canada such services were likely to be unprofitable and prone to nationalization.

To sum up, the more active role of the American state relative to that of Canada is derived from a combination of historical and economic circumstances giving licence to a lengthy phase of laissez-faire capitalism and an accompanying free enterprise ideology supportive of an interventionary state. Canada, conceived in insecurity, lacking resources and compelled to acquire a national identity as a defensive strategy and to defend it by a "crash" program of state sponsored accumulation, by so doing precluded the possibility of a adversarial state role vis-a-vis capital.[36]

Conclusions

The pattern of enforcement of Canada's combines law in the period 1945 to 1986 does not offer unqualified support to any of the major theoretical conceptions of the advanced capitalist state. Least applicable is the liberal model, the main propositions of which are categorically refuted by the state's regulatory performance. The liberal model promises an active interventionary state in the defence of vigorously competitive capitalism, even-handed in its treatment of economic interests and routinely enforcing the letter of the combines law. It is clear that this model bears no relation to the case data that have been analyzed here.

Some case can be made for both the Marxian perspectives in that elements of each can be empirically discerned in the data. In the case of instrumental-Marxism one may point to the presence of members of the economic elite in the state apparatus in this period and the migration of state personnel to the private sector, close state-corporate relations and a formalized channel for consultation and interest bargaining. In addition there is the generally supportive role of the higher judiciary in combines legal issues and the indisputable fact that as a group they share a common class background with the corporate elite. The fact that combines trials are conducted by higher court judges without jury also lends itself to instrumentalist thinking.

Nevertheless, one must look primarily to the structural-Marxian model for a fuller account of the Canadian state's regulatory behaviour in the post-war period. Elites within and outside the state apparatus are inhibited in their actions by structural conditions defining the role of the advanced capitalist state. Instrumentalism serves to explain why particular corporations were or were not prosecuted and why particular cases were resolved in specific ways. An instrumental model may then provide an explanation for ERCO's decision not to contest the charges against them and why the state was prepared to reduce charges, why regulators could not overlook the newspaper cases and why the Eddy Match Company was convicted of monopoly when the Irving newspaper group was not. In doing so, however, the instrumental model of the state is merely accounting for a choice of options within the structural constraints and contradictions of an entrepreneurial state committed to rapid accumulation, while giving obeisance to legitimation in the forms of public ownership and minimal combines enforcement. The weakness of the regulatory state in Canada in this period, and historically, is largely accounted for by the central place it has necessarily occupied in the accumulation process as the chief stimulus to economic productivity, a role necessitated by a combination of history, geography, demography and economic circumstances.

The overall explanatory framework for the pattern of combines enforcement manifested by the Canadian regulatory state in the post-Second World War period is a structural one. Considering the circumstances of state development and the primacy of the accumulation function pursued in close alliance with the corporate elite, the Canadian state has had no systemic obligation to intervene to block mergers and obstruct monopoly formation. On the contrary, state policy has been one of actively encouraging capital consolidation with the object of facilitating accumulation. The only proviso attendant on this has been that a minimal degree of competition be maintained congruent with accumulation goals. A minimal degree of competition will on occasion be more functional than monopoly in that it may be more likely to sustain a stimulus to innovation, research and development, price restraint and organizational efficiency and at the same time allow the state a greater degree of leverage in regulating the industry. A minimal level of competition also serves the important function of legitimation of the economic order, although yielding few instances of combines enforcement.

The empirical "fit" provided by the structural-Marxian model is an imperfect one in view of the decentralized nature of the Canadian state and its lack of autonomy from the corporate elite, structural features which make economic planning increasingly difficult and constitute policy problems for the future.

The data on post-war enforcement of the merger and monopoly provisions of the Combines Investigation Act suggest that the regulatory role of the Canadian state is best explained by combining elements of both the instrumental and structural variants of the Marxian state model. The overall analysis will be a structural one embodying specific instrumental features. The pattern of combines enforcement in the period 1945 to 1986 would therefore be accounted for primarily in terms of the state's structural location in Canadian society and constraints and contradictions inherent in the role performed by it, while not discounting the contribution to state policy of elite relations, the consultative process and class conflict where appropriate.

Theoretically equipped in this fashion, the question of why there was not a vigorous combines enforcement policy in the period analyzed might now be addressed. (1) In terms of the overall structural framework combines enforcement has been weak because fundamentally the Canadian state as it has evolved has no imperative to intervene. The exigencies of state policy have ordained that the state perform a non-interventionary and fiscally supportive role for capital. (2) Secondly, at the instrumental level intervention has been unnecessary because mechanisms have evolved which provide a private forum for the resolution of differences of view between state and corporate elites in a way that precludes public confrontation. (3) Thirdly, since political life in this country has not generally been conducted at the level of class conflict, the state has been under no pressure to enforce combines laws as a means of placating class discontent and legitimating the capitalist social and economic order. The Canadian state's legitimation is not contingent on the combines regulatory function.

Policy Implications

It is clear from the preceding findings that Canada's combines law has had less impact on the development of Canadian capitalism than the executive branch of the state might have wished, and that the chief reason for this has been the pattern of judicial interpretation of the law. The prerequisite of minimal competitiveness is endangered. Levels of corporate concentration have reached a point at which any merger meriting the attention of the Competition Tribunal will have lasting effect on Canada's economic structure if it is permitted to proceed. The Canadian federal regulatory state wants to retain some management capability in the face of growing corporate power and the diminishing number of market players, the increasing incidence of inter-conglomerate mergers, ascendant provincial power, foreign control and "balkanization" of the economy.

The problem for the liberal democratic state in the light of these developments has been to find a way to make competition law a more discriminatory instrument for the assessment of particular mergers of capital. In the 1986 Competition Act the state has sought to solve this problem by transferring the whole question of mergers and monopolies out of the spectrum of criminal law with its ethos of guilt beyond a reasonable doubt, criminal intent and so on, to that of civil law and its more manageable criterion of balance of probability, and to entrust adjudication to a tribunal of persons knowledgeable in the world of economics as well as law. Such a pragmatic approach is not likely to inconvenience the acquisition plans of the great majority of Canada's corporate players.

A secondary problem for the state and one that has been a feature of all previous combines law, is how the whole issue of regulation of competition can be given greater visibility in the eyes of the Canadian public. Without such popular backing the validity of the state's regulatory efforts is likely to be undermined.

The intractability of this problem lies in what Aubert (1952/77:173) recognized as an ambivalence in public attitudes to white-collar crime derived from a conflict of fundamental values rooted in the social structure. The development of capitalism requires rapid accumulation and by means as efficient as possible. In a liberal democracy, however, accumulation must not be rampant without regard for social consequences. Development must be orderly and humane and take place in a context of relative class harmony. At the same time rapid accumulation necessitates that capitalism be allowed to follow its own inner logic of development with its corollaries of concentration of ownership, increase in corporate size and more consequential investment decisions by fewer numbers of persons (greater "highs" and "lows" in productivity and investment levels). As capital ownership becomes more concentrated the need for comprehensive legitimation becomes more pressing and in liberal democracies this has taken the form of the welfare regulatory state.

Underlying economic regulation in liberal democracies are widely held basic values embracing ideals of "free enterprise", competition, the accountability of the economically powerful to society, social justice and the work ethic. The existence of regulators and regulatory laws serves to reassure all outside the corporate elite that the rewards of capitalism will be equitably shared.

Yet the fundamental purpose of regulatory law is to facilitate capitalist development not to obstruct it. Janus-like, regulatory law faces in two directions. Looking "backward" it expresses ideals concerning conditions of small-firm competitive capitalism that in Canada never existed, even while performing its role as apologist for monopoly capitalism. This ambiguity is reflective of ambivalent social attitudes and structural conflict concerning the nature of the capitalist order and the role of the state. On the one hand the perceived social injustices of rapidly evolving and unsupervised capitalism give rise to demands for state regulation but with the qualification that "too much" regulation will impede development. The debate centres around how much regulation is desirable, what kind and under what conditions it should be enforced. In Canada a policy of non-intervention has been followed in the recognition that a condition of minimal competitiveness or shared monopoly served best to afford conditions for rapid accumulation.

Arguments concerning the extent and role of the regulatory state permeate society and the state apparatus, dividing legislators, judges, lawyers, businessmen and the intelligentsia. Within the Canadian state apparatus ambiguity has been manifested in the executive branch's best efforts to negotiate with the corporate elite competition law that will endow the state with a management capability, while the judicial branch has vitiated the legislators' efforts by taking a law that "reads well" and showing it to be without force.

The error lies in seeing the law in instrumental terms in the first place. While combines law sprang from its own inner logic within the capitalist social order, it purported to conditionally stultify the very productive process of capitalism. Combines law delivered less than it promised because its fundamental purpose was to legitimize the capitalist order. To interpret the law in instrumental and literal terms is to confront the conundrum of why the law "does not work". Combines law doesn't work because it is almost entirely normative in nature and its thrust is dialectically in conflict with the inner logic and priorities of capitalism itself and the performance of the highly esteemed business role in which violation of economic regulations is virtually incidental to the paramount function of maximizing profit.

The rationale for regulation must contend with the rationale for economic calculability, and since both are drawn from powerful currents of thought and each has an ability to recognize the claims of the other, the ambiguity of capitalist social relations is likely to continue. As Aubert has suggested, it is in making this ambiguity the focus of study that the dialectical essence of the capitalist social and economic order can be grasped.

To what extent regulatory laws are enforced in any particular capitalist system at any particular time is, inter alia, a function of the balance of contending class forces. Class conflict has played little part in the evolution of the regulatory process in Canada where the record of infrequent (and most unsuccessful) intervention in matters of merger and monopoly has a structural root, namely the irrelevancy of an active regulatory policy for the attainment of accumulation targets.

The state's regulatory role is likely to be a more active and successful one when the public is attentive to the issue and this is likely only when the public directly equates its own economic prospects with corporate performance, a circumstance contingent on the state's ability by means of a public information program to convey the direct nature of the economic and social consequences of corporate concentration. When the public perceives those consequences in terms of diminished consumer choice, higher prices, fewer jobs, enhanced elitism, an increasingly hierarchical social system, greater consultation between elites, loss of democratic principles and diminished accountability as decision making is elevated to higher levels of state and corporate bureaucracies, the question of who owns the corporate economy and how concentrated that ownership is allowed to become will cease to be a secondary matter and take on a significance integral to the whole legitimation question.

In enhancing the state's regulatory capability the structural conditions defining the possibilities of state intervention are not altogether immutable. Canada's satellite status with regard to the United States could be altered by a policy reversing the current rush to continentalism and the pursuit of trade relationships with those capitalist (and non-capitalist) countries technologically and accumulatively in the ascendant such as the "Pacific Rim" nations. Another facet of such an approach, would be the progressive reduction of foreign ownership, an integral component of the National Energy Program. There is, of course, a limit to how far such a policy can proceed; but any structural change promises exponential improvement in the state's manoeuvrability in comparison to what can be attained by changes at the instrumental level. However, if a model of the Canadian state is adopted, couched in predominantly structuralist terms, it must be conceded that the likelihood of such a mobilization of legitimation forces is not great.

Historically there is ample evidence of the corporate elite's ability to exercize political control over the state apparatus and to frustrate the liberal democratic state's efforts to modify the rules of capitalist development in the interests of legitimation of the entire capitalist order. Their success in this regard is attributable to public awareness of the underlying political and economic issues. The raising of popular consciousness by the dissemination of public information would mean that the state's regulatory hand was strengthened by a popular mandate for intervention while intransigence on the part of Canada's corporate elite would for the first time incur a legitimation cost.

FOOTNOTES

1 A spurious basis for comparison would be a distinction between "merger" and "monopoly". Although the 1960 amendments which created section 33 treat merger and monopoly as qualitatively different the courts did not; by the time of the Irving judgement they were being "read as one offence" (Reschenthaler and Stanbury, 1977:165). Monopolies are usually arrived at, at least partly, by merger activity, and mergers, to be considered detrimental to the public interest, must lessen competition to a degree that either establishes a monopoly or the likelihood of one in the future.

2 The cases created precedents. Eddy Match was the first monopoly conviction under the Combines Investigation Act, drawn up in 1910. The ERCO case was the first conviction under section 33 of the Act, legislated in 1960. It was also the first time a prohibition order had been imposed in a case involving merger and monopoly.

3 Unlike the Irving newspaper group ERCO was not a member of a powerful Canadian conglomerate with almost limitless financial resources, headed by an individual known for his willingness to pursue all corporate and personal problems through the courts (Francis, 1986:18, 23).

4 The first, tried in the inter-war period, resulted in an acquittal.

5 Such a revision had been declared government policy since the 1960's, but had been delayed by the implacable opposition of big business to any wording that appeared obstructive of the latter's long-term plans for a restructuring of the Canadian economy along oligopolistic lines.

6 Chief Justice McRuer was not so solicitous of the defendant's rights two years later when presiding at the trial of Arthur Lucas, a black American on a charge of murder. When the Crown proceeded to question Lucas on the irrelevant matter of his occupation as a "pimp", McRuer brushed aside defence counsel's objections (that the line of questioning "had no purpose except to generate prejudice against Lucas in the minds of the jurymen") and proceeded to pursue the subject himself, putting to the defendant such questions as: "How did you collect your money?" Lucas was convicted by the (all-white) jury and was hanged on the occasion of the last execution in Canada (Batten, 1986:267-268).

7 This ruling was established at the time of the Irving trial in the 1970's.

8 In the Eddy Match judgement "substantial control" was enough for a conviction.

9 Some of the larger mergers have been the Hudson's Bay department store takeover of Simpsons and Zellers, the amalgamations Abitibi-Price, Boots-Tamblyn, Kaiser Resources - Ashland Oil, Alberta Gas Trunk Line (now Nova) - Husky Oil, Thomson Newspapers - Hudson's Bay. All of these were implemented in 1978 and early 1979 (Annual Report, Director of Investigation and Research, 1978-1979:13). Notable mergers since then have been Olympia & York Developments' 1985 takeover of Gulf Canada (while Petro-Canada acquired the refining and marketing assets), Dome Petroleum's 1981 acquisition of Hudson's Bay Oil and Gas (just as oil prices fell and interest rates rose, leaving Dome unable to repay a $3 billion loan to four of Canada's five largest banks: Foster, 1984:321) and Genstar's acquisition of Canada Trust, just eight months before it was itself acquired by Imasco (Best and Shortell, 1985:374-375).

10 Reschenthaler and Stanbury (1977:170) see this as another instance of naivety on the part of the courts, "to believe, as the Appeal and Supreme Courts did, that the editors and publishers of five newspapers, owned by one of Canada's largest companies and the largest industrial firm complex in the Province of New Brunswick, will operate in complete autonomy, asks too much".

The Royal Commission on Newspapers (1981:233) made clear its view of what "editorial independence" meant in practice. "The corporate proprietors or their agents determine the resources to be used for the newspaper's content, they choose the people, they set the tone, they establish the implicit guidelines for the what and how of news and the why of acceptable comment. They make their disclaimers in the morning but they go to bed knowing that their trusted agents keep their papers on their lines" (p. 233). To believe newspaper owners encourage editorial autonomy "is ... to dream in colour" (p. 224).

11 The legacy of such a myopic judicial approach to the subject of newspaper ownership became apparent with the disappearance of the official opposition in New Brunswick in the wake of the provincial election of October 13, 1987 (Liberals 58, "Tories" and New Democrats 0). It has since been suggested that the media might assume the role of government critic,

a dubious proposition, in that the Irving interests control much of it and have never been noted for investigative journalism (Maclean's, October 26, 1987: 18).

12 Media holdings may be a growing sector of the Irving conglomerate. Since the Supreme Court absolved them of all wrongdoing the family has purchased the "Atlantic Advocate", a monthly publication, as well as "radio and television stations throughout the Maritimes" (Globe and Mail, February 21, 1987:D1). Irving has been assisted in this by the very persons ostensibly authorized to check the voracious appetite of the syndicate. In 1981 the Canadian Radio-Television and Telecommunications Commission (CRTC) delared that Irving could not acquire any more broadcasting companies, but in January, 1987 this ruling was reversed and licences were granted for new television stations in Saint John, Fredericton, Moncton and Halifax. "Presumably, the Commission reasoned, the region is now better prepared for an Irving hegemony" (p. D2).

In 1982 the CRTC, on the instructions of the Liberal Cabinet, refused licence renewals to television stations owned by newspaper companies in the same market. As with all other challenges to their power the Irving interests went to court, and in the course of litigation the CRTC's new political masters capitulated: in June, 1985 "the federal Tory cabinet revoked the directive" (Francis, 1986:18). Local governments have been just as obliging (Globe and Mail, February 21, 1987:D1).

There appears to be no counter-force to the Irving corporate empire, which owes its growth to "an ability to lobby politicians, an aggressive desire to erect barriers against competitors, and an absence of social responsibility ..." (Francis, 1986: 15).

13 The conspiracy convictions were achieved on the basis of documentary evidence of price fixing via the "price leadership" of Canadian General Electric (34 C.C.C. (2d.) 502-503) and extensive collusion between the three defendants, resulting in an "undue lessening of competition". A monopoly conviction required a different criterion (causing or likely to cause public detriment), for purposes of which the same evidence could not be entered twice (p. 541).

14 Without a fine sensitivity to the political environment the parties could not have acted with some degree of assurance; fortunately for them, the corporate elite keep their ears to the ground.

Fisher had it on good authority that the combines laws would not be amended in the near future, and FP's Currie had this confirmed by no less a person than the Minister of Industry, Trade and Commerce (Globe and Mail, September 21, 1983:4). They could therefore proceed under the auspices of an egregious law which declared that an absolute monopoly was not necessarily detrimental, and newspapers were primarily objects of commerce. In such circumstances the environment can be highly predictable and, should the situation warrant it, the ear of the Prime Minister and that of the occasional premier can be had by men of substance, in order to ensure that what is "going down" is politically "understood".

15 In acquiring the assets of the "Winnipeg Tribune" before it was "cold" Thomson Newspapers knew its actions were beyond (legal) reproach, since the "Tribune" was no longer (legally) a "business" as defined by the Act, not for some hours in fact. Similarly, the decision to close the "Montreal Star" was made before Southam (publicly) made an offer to FP, one day before (Southam obtained the assets seven months later by agreement). If it was the strategy of the defendants to scrupulously avoid the appearance of criminality, while clandestinely bargaining for monopolies, the Court obliged them by accepting appearances as indicative of the true facts.

16 It might reasonably be asked why a series of private meetings, concealed even from their respective staffs, were necessary between competitors, if the purpose of those meetings was not to end competition by mutual consent. The question also arises as to why, if the meetings were not conspiratorial in theme, advisers or assistants were not present.

17 Geis (1973:186) sees cultural congruence as an obstacle to convictions for corporate crime offences or adequate penalties upon conviction, since the presiding judge "often shares the same economic views" as the defendant.

Awaiting the trial verdict John Tory and Gordon Fisher displayed, in interviews, a typical concern (Clinard and Yeager, 1980:318) about the effect of adverse publicity as a result of the trial. Tory felt it necessary to conclude a telephone conversation with the "Globe and Mail" reporter who reported the trial by telling him: "If you quote me on anything, I'll deny it and I'll phone your publisher". Fisher was interviewed in the presence of legal counsel, "choosing his words carefully after being advised by his lawyer to be cautious" (Globe and Mail, December 10, 1983b:5).

18 A jury of plebeians might have introduced a modicum of common sense into the proceedings, but under the terms of the Act all combines trials are non-jury affairs, presumably on the premise that such matters are beyond the understanding of the average citizen. Bearing the entire burden of the judgement, Mr. Justice Anderson was able to employ only the "common sense" of the corporate entrepreneur.

19 It should be borne in mind that the cases which receive mention at all in the annual reports are those which have progressed some way, at least beyond an initial inquiry by the Director's staff. Files are opened on receipt of a complaint but will not receive official mention unless it continues to the investigation stage. Every annual report contains numerous references to "discontinued inquiries", with only a comment that the Director had concluded that the facts did not warrant further investigation. Again, more is obscured than revealed by such terse pronouncements.

20 Part of the delay was due to the case being held in abeyance while a related legal issue was resolved (Gorecki and Stanbury, 1979:165 fn.).

21 The Director's Annual Report of 1978-1979 notes that the two urban markets "have been monitored on a continuing basis ..." (p. 73). Copies of all new leases by Safeway were examined to ensure they did not contain restrictive clauses for competitors. The company's advertising budget was also inspected.

Despite the monitoring, the Bureau of Competition Policy did not oppose Safeway's acquisiton of 23 Woodwards' stores in 1987. The Director's renewed assurances concerning future monitoring (Edmonton Journal, May 21, 1987:B7) should perhaps be regarded with some skepticism.

22 For merger and monopoly offences no upper limit was set from 1952 to the end of the period under review in this study. It will be recalled that Eddy Match and one of its subsidiaries each received the maximum fine of $25,000 then in force. In 1970 ERCO was fined only $40,000, by a judge who bemoaned past sentencing practices while electing not to change the precedent.

23 The courts have, in specific instances, invoked a number of considerations in assessing fines for offences under the Act, including the duration of the offence, size of the corporate offender, previous convictions, degree of participation in the offence, destruction of evidence, degree of cooperation with

the Crown, share of the market and need for deterrence. However, there is no statutory requirement that any of these factors should be kept in mind when imposing a fine or other sentence.

Stanbury (1976:616-617) stipulates five criteria in setting fines: (1) they should include assessments of illicit profit, (2) fines should allow for the probability of detection, prosecution and conviction and should "significantly exceed the incremental benefit of the offence to account for the odds of not getting caught" (p. 616), (3) fines should take into account the period of time in which the offender has enjoyed illicit profit; fines should not be "interest free loans" (p. 616), (4) the net financial position of corporations should be worsened by fines so that shareholders do not benefit, (5) fines should be negatively correlated with the "sensitivity-to-risk" in the decision making of corporate officers.

24 The Law Reform Commission has argued that the inadequacy of fines is not the fault of the courts. "Judges are asked to establish appropriate fines for corporate offenders without any particular expertize in corporate finance and without the benefit of legislative guidelines" (Law Reform Commission, Working Paper 16, 1976b:38). The Commission agrees fines should be related to profit levels, assets and so on, but argues that fines by themselves are not adequate for the accomplishment of corporate sanctioning objectives, such as changing behaviour patterns within corporations and compensating victims (p. 67). The Commission argues that illegal profit can only be assessed by an independent authority capable of making such an assessment and ordering payment (p. 67).

25 Stanbury (1976:578) has called for a study of the actual impact of prohibition orders. Gorecki and Stanbury (1979:173) argue for the right of consumers to sue corporations for breach of a prohibition order, in which case "the usefulness of such orders might increase". They also suggest that the Director should publish a list of all current prohibition orders for the attention of competitors and customers alike. The Law Reform Commission (Working Paper 16, 1976b:35) argues that corporate employees should be made personally accountable for the implementation of all court orders.

26 The Law Reform Commission felt that restitution to victims for corporate offences should be accomplished whenever it could reasonably be done (Law Reform Commission, Working Paper 16, 1976b:47).

27 In the United States a number of innovative penological ideas have been adopted, most of which have not even been suggested in Canada. Corporations have been required to sponsor or perform programs of community service as a condition of mitigation of sentence (Fisse, 1981:974, 977). Businessmen have been asked to make speeches to public and business groups "on the evils of price fixing" (Stanbury, 1976:615) and other offences. Corporations have been placed "on probation": a public trusteeship is created and the company continues in business, providing conditions are met. Atlantic Richfield, for example, was ordered in 1972 to clean up an oil spill within 45 days (Yoder, 1978:53). Corporations may be debarred from government contracts (Clinard and Yeager, 1980: 317) or otherwise limited in their entrepreneurial activities (Fisse, 1971:118), an option recommended by the Law Reform Commission (Working Paper 16, 1976b: 41) for Canada. The Commission has also advocated public representation on corporate boards (p. 60), and class action and treble damage suits, both available in the United States, as well as government sponsored civil suits (p. 61), all of which the Commission felt, should be exhausted before criminal prosecution was undertaken (p. 63).

Finally, publicity as a means of warning, educating and moralizing or to lower corporate prestige could be used effectively (Fisse, 1971:122, 143), especially for restraint of trade offences which do not have high visibility in public perception (Fisse, 1971: 131; Stanbury, 1976:607). In Canada publicity was seen as the chief sanction in the early years of the legislation (Goff and Reasons, 1978:53) but has since "been quietly abandoned in favour of a policy of minimizing embarrassment to the parties concerned" (Rosenbluth and Thorburn, 1963:100).

28 This provision was earlier available under the terms of the Customs Tariff Act of 1897 and was exercized only once, in 1902 (Stanbury, 1976:575-576).

29 Stanbury (1976:612) points out that Parliament has had ample opportunity to take the legislative initiative. A member of Parliament introduced a private member's bill every year from 1963 onward proposing mandatory jail sentences for persons convicted of combines offences, but no government saw fit to give it support. This is unfortunate in that businessmen appear to be especially prone to deterrence (Braithwaite and Geis, 1982:300-302; Hopkins, 1980: 212), and to manifest a fear of criminal prosecution (Ball and Friedman, 1978:308) and incarceration (Box, 1983:71; Yoder, 1978:50). A greater certainty of imprisonment would serve to increase the deterrent (p. 56).

30 In the mid-1970's a Progressive Conservative member of Parliament expressed what may then have been the received opinion that "99 per cent" of businessmen "are honest and never get into criminal situations" (Stanbury, 1976:609). The speaker was Sinclair Stevens who, in 1987, was found by a public inquiry to have been in violation of his own government's conflict of interest guidelines on at least 14 occasions while serving as a Cabinet Minister (Edmonton Journal, December 4, 1987:A1). Mr. Steven's legal costs, amounting to $650,000, were paid by the taxpayer (p. A3).

31 A trust was a form of combination in which industry members exchanged their corporate stock and entrepreneurial independence for securities in the name of the trust, administered by a central board of trustees (Morison, 1972:73). It would later come to mean "any large business combination" (Nevins and Commager, 1976:268).

32 It should be noted that despite the celebrated "trust-busting" reputation of the (Theodore) Roosevelt administration (1901-1909) more trusts existed in 1908 than in 1904 (Nye and Morpurgo, 1965:621). After 1906 regulation, not dissolution of trusts, was seen to be the answer (Morison, 1972:143).

Regulatory legislation, as in Canada, was highly qualified: the Interstate Commerce Act of 1887, the first federal regulatory law, referred only to acts or agreements of a monopolistic nature affecting interstate commerce unduly or "unreasonably" (p. 144). The Sherman Act, like Canada's Combines Investigation Act, "despite the vigour of its language, was difficult to enforce and easily beaten in the courts" (Nye and Morpurgo, 1965:564), and some of the largest trusts were formed in the decade after the passage of the Sherman Act (Nevins and Commager, 1976:277), incorporating virtually all industries (Josephson, 1934:387). A conservative Congress was a further impediment to social reform, obstructing for some years supplementary legislation; even so there was a greater readiness to seek redress in the courts than is found in the Canadian experience. In summary, it can be said the American anti-trust movement was a response to populist discontent, expressive of free enterprise ideals but essentially non-threatening to capital.

33 The most powerful corporate sector accused of anti-combines offences in the period of analysis was the oil industry. A seven-year investigation by the

Bureau of Competition concluded that all the major companies were responsible for a wide range of breaches of the Combines Investigation Act. However, even before the Bertrand Report was released the Director had decided not to recommend the laying of criminal charges (Baetz, 1985:358). Between 1952 and 1973 the oil industry was the subject of inquiries under the Act 49 times, more than any other industry "yet none of these inquiries resulted in a conviction of the oil industry" (p. 351).

34 In 1952 the federal government collected 73 per cent of all state revenue in Canada but only 52 per cent in 1971. In 1952 the provinces collected just 15 per cent, which had risen to 35 per cent by 1971. In that year the provinces were spending 42 per cent of total revenues (Olsen, 1980:12).

35 A more successful legitimation device has been public ownership in the form of provincial and federal crown corporations.

36 An examination of the regulatory performance in other sectors of corporate activity reveal the same basically non-interventionary stance and a reluctance to act even after irregularities have come to the attention of supervisory authorities. This has been the case in Canada for corporate behaviours as diverse as pollution (Globe and Mail, December 19, 1986:A8), and stock trading (Maclean's, October 28, 1985:44, 46), but particularly so in the matter of financial institutions where regulatory irresolution resulted in the collapse of two western Canadian banks in 1985 (Best and Shortell, 1985:323-328), and the Principal Group Ltd. in 1987 (Maclean's, January 18, 1988:32-35). Elsewhere across Canada inattentiveness and indulgence toward the regulated has resulted in scandals involving trust companies (Best and Shortell, 1985:213-331), and the insurance business (Fleming, 1986:315-339).

Reasons, Ross and Paterson (1981) have drawn attention to the non-enforcement of Canada's labour safety laws and Snider and West (1980) reviewed regulatory provisions at the municipal (Toronto) provincial (Ontario) and federal levels which revealed a standard policy of non-intervention or leniency.

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APPENDIX I

COMBINES ENFORCEMENT, SECTION 33, COMBINES INVESTIGATION ACT, 1945-1986

Defendant	Alleged Offence	Type of Adjudic.	Judgmt. or Decision	Penalty	Year Case Resolved
Eddy Match, et al.	Combine*	CP	G**	F,C.	1953
Canadian Breweries	Combine	CP	A	-	1960
British Columbia Sugar Refining, et al.	Combine	CP	A	-	1960
ERCO	Merger, Monopoly	CP	G***	F,OP	1970
Wee Folks Diaper, et al.	Monopoly	RR	RFC	OP	1971
Anthes Imperial	Merger, Monopoly	RR	RFC	OP	1973
Safeway	Monopoly	RR	RFC	OP	1973
Allied Chemical, et al.	Monopoly	CP	A	-	1975
Canadian General Electric, et al.	Monopoly	CP	A	-	1976
K.C. Irving, et al.	Combine, Merger, Monopoly	CP	A****	-	1976
Thomson, et al.	Merger, Monopoly	CP	A	-	1983
Pacific Northwest Bus Co.	Monopoly	RR	RFC	OP	1986

(See over for Key)

KEY

A - Acquitted
C - (Legal) Costs
CP - Criminal Prosecution
F - Fine
G - Guilty
OP - Order of Prohibition
RR - Regulatory Ruling
RFC - Regulatory Finding of Culpability

* - Merger, Trust or Monopoly.
** - Appealed to Quebec Court of Queen's Bench. Appeal Denied.
*** - Pleaded guilty to one merger and two monopoly charges. Two monopoly charges dismissed.
**** - All defendants but one convicted at trial. Overturned by New Brunswick Court of Appeal; confirmed by Supreme Court.